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No. _____

In the Supreme Court of the United States

THE COUNTY OF BEAVER, PENNSYLVANIA AND
BEA SCHULTE, COMMISSIONER,
IN HER INDIVIDUAL CAPACITY,
Petitioners,

v.

DELORES ARMOUR,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the *Elrod/Branti* inquiry into whether a governmental position is entitled to First Amendment protection against patronage dismissals a question of law for the court or a question of fact for the jury?

LIST OF PARTIES

Petitioners
The County of Beaver, Pennsylvania and Bea Schulte, Commissioner, in her individual capacity

Respondent
Delores Armour

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition is published at 271 F.3d 417. It is reprinted in Appendix C hereto ("App. C") at page 5a. By order filed December 20, 2001, the Court of Appeals denied the petition for panel rehearing or en banc rehearing. App. A at 2a.

JURISDICTION

On March 30, 2000, the United States District Court for the Western District of Pennsylvania issued an Opinion and Order granting the County of Beaver and Bea Schulte's ("County" and "Schulte" respectively) motion for summary judgment. A timely appeal was filed by Delores Armour to the United States Court of Appeals for the Third Circuit. On November 21, 2001, the Third Circuit reversed the decision of the District Court and on December 20, 2001, the Third Circuit denied the petition for panel rehearing or en banc rehearing filed on behalf of County of Beaver and Bea Schulte. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) .

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances." U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution provides in part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV.

42 U.S.C. § 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

STATEMENT OF THE CASE

The governing body of the County of Beaver is comprised of three elected county commissioners. Under Pennsylvania law, the corporate power of each of the 67 counties is vested in their board of commissioners. 16 P.S. § 203. The board of commissioners sets the policy for county

government, establishes the budget, sets taxes, and in every other manner is responsible for the effective management of county government.

Delores Armour ("Armour") became employed with Beaver County as personal secretary to Commissioner Schulte in January, 1996, when Schulte was elected. Armour had previously served on Schulte's election committee. Historically, each of the commissioners chose or brought in their personal secretary.

Armour considered herself to be the confidential secretary to Commissioner Schulte. In response to a County questionnaire regarding her job description, Armour noted:

> Although this job may appear secretarial in nature, a large portion of the duties fall more toward administrative assistant. The high level of confidentiality and responsibility reaches far beyond the desk, and often into our personal lives. A broad background of County government is essential for even the entry level of this position.

She operated as Commissioner Schulte's conduit for information from constituents, department heads and other elected officials. She screened the Commissioner's telephone calls and attended political functions with Schulte. Armour also attended local organization meetings on behalf of the Commissioner and voted her proxy. The personal secretaries to the commissioners served as their eyes and ears.

Armour's employment was terminated in February, 1999. Armour alleges that she was discharged from her employment by the County of Beaver and Commissioner

Schulte in violation of her First and Fourteenth Amendment rights cognizable under 42 U.S.C. § 1983. Specifically, Armour claims that she was discharged for her political affiliation. The County and Schulte moved for summary judgment and the motion was granted by the District Court for the Western District of Pennsylvania. On appeal, the Court of Appeals for the Third Circuit reversed the decision of the District Court, holding that the issue of whether political affiliation was an appropriate job requirement was an issue for the jury.

REASONS FOR ALLOWANCE OF THE WRIT

The Third Circuit, in *Armour v. County of Beaver, Pa.*, 271 F.3d 417 (3d Cir. 2001), appropriately recognized that the issue of whether political affiliation was a constitutionally permissible job requirement for the personal secretary to a Beaver County Commissioner was "particularly fact-specific," but from that foundation went on to abdicate its responsibility and authority. *Id.* at 428, 431, 432-33. In sum, the Third Circuit concluded that this ultimate constitutional issue was a question of fact for a jury, and not a question of law for the court. This holding radically diverges from the prior decisions of this Honorable Court and is in direct conflict with the decisions of a majority of circuit courts on the same important matter.

In *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court recognized that the First Amendment protects a large segment of governmental employees from patronage decisions in employment and emphasized the constitutional nature of the analysis underlying First Amendment discharge cases. In *Elrod*, the plurality concluded that the First Amendment's protections apply to non-policymaking, non-confidential employees.

Elrod, 427 U.S. at 375. This Court framed the inquiry in *Branti* as whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Neither decision provides significant guidance on the application of the principals set forth therein, nor has this Court shed further light on the process the lower courts are to employ in applying the political justification exception. Yet, at their core, *Elrod* and *Branti* are founded upon the recognition that certain positions are inherently entitled to constitutional protection against patronage decisions and certain positions are not constitutionally protected. The issue presented to this Court is whether a judge or jury decides the parameters of the Constitution's protections.

This case goes to the heart of the issue of the responsibility of the court to interpret the Constitution. In *Markham v. Westview Instruments, Inc.*, 517 U.S. 370, 377, 384 (1996), this Court referred first to history and secondarily to precedent and functional considerations in addressing the scope of the jury's authority versus that of the judge. This test was relied upon most recently in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In his concurrence, Justice Scalia recognized the "historical preference for juries to make primarily factual determinations and for judges to resolve legal questions." *Id.* 526 U.S. at 730. In support of this methodology, Justice Scalia pointed to the fact-law dichotomy that has evolved in § 1983 cases. *See Horstkoetter v. Department of Public Safety*, 159 F.3d 1265 (10th Cir. 1998) (question of law whether speech is constitutionally protected, question of fact whether discharge caused by speech (1998)); *Myers v. County of Orange*, 157 F.3d 66 (2d Cir.) (question of law whether municipal practices were unconstitutional, question of fact whether policies existed or harmed plaintiff.) While historical

analogue provides little guidance in this case, precedent and functional considerations dictate that the fact-law dichotomy be resolved in favor of a question of law.

a. The Decision of the Third Circuit Conflicts with the Decisions of this Court as to the Authority of the Courts to Decide the Parameters of Constitutional Protections.

This Honorable Court need look no further than its own interpretations of the First Amendment to perceive the fallacy of the holding of the Third Circuit. The foundational question in all claims arising under the First Amendment - in fact, under any constitutional theory - is whether the conduct, expression, or right is protected by the United States Constitution. In this context, is the position protected by the First Amendment? To suggest that such issues are questions of fact for the jury to decide is farcical. Moreover, it stands in stark contrast to the mechanism by which all other constitutional questions are answered.

A case asserting a patronage firing mirrors those cases involving retaliatory discharge of a public sector employee for protected speech. In fact, as noted by Justice Kennedy in *O'Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 712 (1996), there is often overlap between such cases.[1]

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[1] This case was pled as a political patronage case. As such, it was argued through the Court of Appeals in that manner. However, unlike *Elrod* or *Branti*, this is not a situation of a lack of support for a particular political party or even political support for the employer/elected official. Armour asserts that her termination was in retaliation for her political support for a district magistrate candidate. To follow the reasoning of the Court of Appeals, and to

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court first addressed the issue of the right of governmental employees to speak on matters of public concern without fear of reprisal. This Court recognized that "the problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as employer, in promoting the efficiency of the public service it performs through its employees." *Id.* 391 U.S. at 568. Subsequently, in *Connick v. Myers*, 461 U.S. 138 (1983), this Court expounded upon the First Amendment protections provided to governmental employees. Justice White noted that the intent of the First Amendment was not to protect speech that is only political but also to protect other types of speech. "Great secular causes, with smaller ones, are guarded." *Id.* 461 U.S. at 147, *citing United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967), *quoting Thomas v. Collins*, 323 U.S. 516, 531 (1945). Most importantly for this analysis, in *Connick* the Court specifically held that the inquiry into the protected status of speech is one of law, not fact. *Id.* 461 U.S. at 148, n.7. This Court recognized that "although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Id.* 461 U.S. at 150.

This view of the responsibility of the courts is not new. To the contrary, it is the viewpoint of the Third Circuit Court of Appeals that is novel. The obligation of the courts to interpret and apply the Constitution is at the core of our

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disregard this Court's prior admonitions, a strict dichotomy will be enforced, with the result that a jury will decide the constitutional protections in patronage cases and a judge will decide those same protections in free speech cases.

system of government. Since *Pennekamp v. State of Florida,* 328 U.S. 331 (1946), this Honorable Court has uniformly recognized the mandate of the courts to interpret the principals of the First Amendment. As Justice Reed stated:

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principals of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.

Id. 328 U.S. at 335. In *Pennekamp*, this Court dealt with the application of the "clear and present danger" standard to commentary on pending litigation and concluded that it remained the responsibility of the courts to achieve the balance between the "desirability of free discussions and the necessity for fair adjudication... ." *Id.* 328 U.S. at 336. There is no legitimate difference between the First Amendment analysis conducted in *Pennekamp* and the analysis to be conducted in a political affiliation case. In achieving a balance among competing interests – the employee's interest in political association and the employer's interest in the provision of governmental services – the court must retain the authority to examine the position in question and determine whether it is of the character which the First Amendment protects.

To allow the decision of the Court of Appeals to stand will place this Court's imprimatur on an artificial dichotomy between political affiliation and protected speech cases. Both cases have the same genesis - the First Amendment. Both cases deal with the same ultimate question. Is the conduct constitutionally protected? Both cases require the court to weigh the interests of the governmental employer against those of the employee. Yet, by rationalizing that a jury may determine whether a particular position is confidential or policymaking in a political affiliation case or more specifically, whether political affiliation is an appropriate condition of employment, the Third Circuit has divested the district court judge of the mandate to interpret the United States Constitution. The inquiry into the propriety of political affiliation as a job requirement is not an intermediate inquiry. It is the determinative question. Is the position constitutionally protected? The Third Circuit has not identified a subordinate question which must be answered by the jury in this case, and one cannot be identified.

In his dissenting opinion in *Board of Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996), and *O'Hare Truck Service, Inc. v. Northlake,* 518 U.S. 712 (1996), Justice Scalia argues that the majority decision had created two separate standards for consideration of First Amendment cases. One standard was to be applied to those cases involving political affiliation and the second standard is applicable to protected speech cases. *Umbehr,* 518 U.S. at 704-706. Justice Scalia provides the following warning:

> ...[H]enceforth "the freedom of speech" alluded to in the Bill of Rights will be divided into two categories: (1) the "right of free speech," where "we apply the balancing test from *Pickering*," and (since this "right of free

> speech" presumably does not exhaust the Free Speech Clause) (2) "political affiliation," where we apply the rigid rule of *Elrod* and *Branti*.

Id. 518 U.S. at 704. Since many political affiliation/*Pickering* cases are "intermixed," the *Pickering* balancing test may still be required.

Whether or not this Honorable Court intended such a result in *O'Hare* and *Umbehr* does not support the action taken by the Court of Appeals in this case. Quite simply, this Court has evidenced no intention to back away from the legal test applied in a political affiliation case - whether political affiliation is an appropriate requirement for the effective performance of the public office involved -- or more importantly, to establish that the protected status of conduct under the First Amendment is a question of fact under one analysis and a question of law in another.

In extending the protections of the First Amendment to independent contractors, this Honorable Court engaged in an analysis of the genesis of the *Elrod-Branti* rule. In doing so, Justice Kennedy recognized that even in a strict political affiliation case, "the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed." *O'Hare Truck Service, Inc.*, 518 U.S. at 719. Not only is there no indication that the Court intended to shy away from the test applied in *Branti* to judge a political affiliation assertion, the Court specifically recognized that, as in the *Pickering* analysis, a "case-by-case process will allow the courts to consider the necessity of according to the government the discretion it requires in the ...delivery of

governmental services." *Id.* 518 U.S. at 720-721. Is the jury to decide the discretion needed by the government in an *Elrod/Branti* situation, but not a *Pickering* issue?

In a protected speech case, the trial court judge is charged with the responsibility of determining whether the expressive activity is on a matter of public concern and whether the interests of the governmental employer in regulating certain types of speech outweigh the interests of the employee. *Connick v. Myers*, 461 U.S. 138 (1983). This has been recognized and applied by virtually every circuit court. *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3d Cir. 1997); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990); *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000); *Colburn v. Trustees of Indiana University*, 973 F.2d 581 (7th Cir. 1992); *Belk v. City of Eldon*, 228 F.3d 872 (8th Cir. 2000); *Lytle v. Wondrash*, 182 F.3d 1083 (9th Cir. 1999); *Horstkoetter v. Oklahoma Department of Public Safety*, 159 F.3d 1265 (10th Cir. 1998); *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989). It is this two-part inquiry that allows a judge to determine whether speech is protected by the First Amendment. Once that decision is made, it is for the jury to decide the factual issues of whether the speech was a substantial factor in the employment action and whether the action would have been taken in the absence of the protected activity. If the decision of the Third Circuit is permitted to stand, the question of the constitutional protections afforded to a particular position will go to the jury along with the factual issue of causation. The question in a political affiliation case as to whether a position is confidential and/or policymaking is no different than the question of the balancing of interest between the employer and the employee in the *Pickering* analysis. In fact, this Court's decisions illustrate this point.

The difficulty encountered in attempting to consider as a cohesive unit the decision of the Court of Appeals in this case and the decisions of this Honorable Court is evident in the margins. Perhaps as a result of this Court's prior decisions, the pure political affiliation cases are a rarity. The vast majority of these cases will fall into the *O'Hare* type of scenario, an intermixed case. Yet, it is clear that the lower courts have struggled with a mechanism by which to apply the *Elrod/Branti* decisions in conjunction with the *Pickering* analysis. In *Rankin v. McPherson*, 483 U.S. 378 (1987), this Court referred to a number of factors to be considered in the *Pickering* balancing test as to whether an employer's interests are impaired by an employee's speech. These factors require a court to consider whether the speech: "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* 483 U.S. at 388 (citation omitted). All of the factors are fact-intensive, yet, they are to be determined by the trial court in determining, as a matter of law, whether the speech is protected speech under the First Amendment.

Several courts have had occasion to encounter the "policymaking" employee in the *Pickering* analysis. In *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997), the Court of Appeals for the Second Circuit opined that the employee's status as policymaking or confidential did not have preclusive effect in the *Pickering* analysis. As noted by the Court, "common sense tells us that the expressive activities of a highly placed supervisory, confidential, policymaking or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion." *Id.* 124 F.3d at 102. Yet,

the status of the employee in the relationship between the employee and employer is simply one factor in the *Pickering* balancing test. This Court's decision in *O'Hare* would seem to lead to a similar conclusion.

This line of reasoning, in conjunction with the decision of the Court of Appeals in this case, leads to a quandary for trial judges. If a plaintiff pleads a First Amendment case on the basis of *Elrod/Branti*, the question of whether the employee is a policymaking or confidential employee, i.e. whether political affiliation is an appropriate condition of employment, is a question of fact for the jury. If the plaintiff pleads a First Amendment case on the basis of protected speech, whether the employee is a policymaking or confidential employee will be one aspect of a question of law to be determined by the trial court judge. If the case is intermixed as in *O'Hare*, is it a toss of the coin? The determination of these issues should not come down to how the complaint has been pled. Yet, under the analysis of the Third Circuit Court of Appeals, if there is any hint of an *Elrod/Branti* issue, the jury will divest the trial court judge of its constitutional mandate and assume the role as interpreter of our most precious document.

One is hard pressed to identify a single similar issue upon which the jury has been granted this type of authority. It has always been, and continues to be, within the sole province of the judiciary to make the initial determination of the rights which are protected by our Constitution. Whether those constitutionally protected rights have been violated will remain an issue for the jury. However, at what point those rights arise must remain a question of law reserved for the jurists.

In another First Amendment context, Justice Harlan recognized the obligation of the court to balance the state's interests versus those of the citizenry in free speech to determine whether the conduct was protected. *See Cohen v. California*, 403 U.S. 15 (1971). In *Jett v. Dallas Independent School District,* 491 U.S. 701 (1989), this Court confirmed that the question of where policymaking authority lies for purposes of 42 U.S.C. §1983 is a question of law for the trial judge. Similarly, in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), it was held that determining whether state action under the Fourteenth Amendment exists is a resolution of a question of law. *See also Blum v. Yaretsky*, 457 U.S. 991 (1982). Whether an individual has a property right in employment is a question for the court. Substantive due process claims are routinely determined by the court. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853-855 (1998); *Washington v. Glucksberg*, 521 U.S. 702, 722-723 (1997). In *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993) (en banc), the Court noted that "with issues of substantive due process, equal protection, and the First Amendment, the weight of a state's interest has always been a legal question, not a factual one." *Citing Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). At every juncture, this Court has recognized that the basic determination of the rights of the citizenry protected under the Constitution are questions for the judge.

In each of these scenarios, the "facts" to support the conclusion as to the rights of the parties are in actuality "ultimate facts," encompassing application of law. *See Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500-01 and n.16 (1984); *Powell v. Texas*, 392 U.S. 514, 521-22 (1968). In addition, this Court has recognized

that the sufficiency of evidence to support a conclusion that "a constitutional predicate... has been satisfied presents a question of law." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), vacated and remanded on other grounds, 518 U.S. 1001 (1996), *citing Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685-89 (1985); *New York Times v. Sullivan*, 376 U.S. 254, 284-86 and n.26 (1964).

The fact that a particular question may be fact-intensive or requires the court to engage in line drawing is not novel to cases involving claims of retaliation on the basis of political affiliation. As noted by Justice Holmes, "the great body of the law consists in drawing such lines," *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting), "[n]either are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types." *Irwin v. Gavit*, 268 U.S. 161 (1925) (Holmes, J.). This question asks no more of a court than any other question requiring a determination of the parameters of the United States Constitution. To carve out a single, finite claim from all other First Amendment inquiries, and from all other constitutional inquiries, serves no rational purpose and is a misguided statement of the law.

b. The Third Circuit's Decision in *Armour* Conflicts Directly with Other Circuit Courts on the Same Important Matter of Whether Political Affiliation as an Appropriate Job Requirement is a Question of Fact for the Jury or Law for the Court.

The majority of circuit courts, that have directly addressed the issue, have held that it is within the province of the court to decide whether a particular government position is one for which political affiliation is an appropriate job requirement. Yet, the Third Circuit cases cannot be reconciled on the issue of whether the *Elrod/Branti* exception is a question of law or fact, and the decisions of the Fifth, Seventh, and Tenth Circuits hold that it is a question of fact for the jury. In light of the irreconcilable division between the circuit courts, the Petitioners request review by this Honorable Court of the issues defined herein.

To demonstrate the problem, *Elrod*, the seminal case on political patronage dismissals, is cited by the circuit courts for both sides of the fact versus law issue. In *Elrod,* Justice Brennan recognized that issues of constitutional importance are reserved for the court. *Elrod*, 427 U.S. at 352. "[W]hether the politically motivated discharge of employees . . . comports with the limitations of the First and Fourteenth Amendments . . . involves solely a question of constitutional interpretation, a function ultimately the responsibility of this Court." *Id.* Certain circuits have chosen to ignore this formulation of the issue and have relied upon Justice Brennan's observation of the fact intensive nature of defining who is a policymaker in a political discharge case: "the political loyalty 'justification is a matter of proof, or at least

argument, directed at particular kinds of jobs,'" *Id.* at 368, to assign the question to a jury. *See Stegmaier v. Trammell,* 597 F.2d 1027, 1034 n.8 (5th Cir. 1979). While the plurality in *Elrod* declined to establish any bright line tests to the political affiliation issue, it, in no measure, removed the responsibility for constitutional interpretation from the ambit of the court. At most, the plurality acknowledged that the analysis of the political patronage justification requires an individualized review of each position.

At the core of the split among and within the U.S. courts of appeal are two pervasive themes. First, there is confusion between a question of fact for a jury and a fact-specific inquiry. Second, the courts, in wrestling with the complicated analysis required by the various tests created under *Elrod/Branti* and their progeny, have essentially dodged the issue by finding no dispute of material fact of record and granting judgment *as a matter of law* under Rule 56(c), which is not the same (although routinely mistaken as the same) as deciding the issue as a question of law. *See, e.g., Dickeson v. Quarberg,* 844 F.2d 1435, 1443 n.7 (10th Cir. 1988) ("We recognize the circuits are split over" the law or fact issue. "[W]e need not decide this procedural issue." "From the record, the duties . . . are clear and undisputed."); *Kline v. Hughes*, 131 F.3d 708 (7th Cir. 1997) (The record on summary judgment established under the laws of Indiana, that political affiliation was as a matter of law an appropriate requirement for deputy county auditor.); *Ness v. Marshall,* 660 F.2d 517, 522 (3d Cir. 1981) ("Where as a matter of law, a person is determined to have occupied a policymaking position . . . patronage dismissals under Elrod and Branti are disposable on a motion for summary judgment.")

The First, Second, Fourth, Sixth and Eighth Circuits are firm in their positions that it is the role of the court to

determine whether the *Elrod/Branti* exception applies. In addressing the difficulty of applying the *Elrod/Branti* exception, the First Circuit opined: "[A] court's function, it seems to us is to do what courts are often called upon to do—to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served." *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986). In *McGurrin Ehrhard v. Connolly*, 867 F.2d 92 (1st Cir. 1989), the court held that whether political affiliation is an appropriate job requirement is for the court:

> In this case, we have taken the basic facts from the record, determining what happened by viewing the evidence in a light most favorable to the plaintiff ... . Whether those facts demonstrate a job that falls within the *Elrod-Branti* "party affiliation" exception, however, is a question of law. In light of the important constitutional and governmental interests surrounding the application of the exception, we believe it the kind of legal question that the court, not the jury is best suited to determine.

Id. at 93 (citations omitted). *See also Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7 (1st Cir. 1996).

The Second Circuit takes an equally persuasive position that the court should review the constitutionality of First Amendment dismissals, recognizing that there is a difference between a question of fact and a fact specific inquiry. *Gordon v. County of Rockland*, 110 F.3d 886, 893 n.3 (2d Cir. 1997). *See also Vezzetti v. Pellegrini*, 22 F.3d 483 (2d Cir. 1994); *Regan v. Boogertman*, 984 F.2d 577 (2d Cir. 1993).

In *Stott v. Haworth*, 916 F.2d 134, 143 (4th Cir. 1990), the Fourth Circuit held that the issue of political patronage as a job requirement "is a question of law to ultimately be decided by the courts." Similarly, in *Mumford v. Basinski*, 105 F.3d 264, 271 (6th Cir. 1997), the Sixth Circuit stated that in general the duties of a position may be delineated by state law and the specific duties fact-driven, but the characterization of the position as political or nonpolitical is a question of law. *See also Hoard v. Sizemore*, 198 F.3d 205, 211-212 (6th Cir. 1999) ("the plaintiff mixes the factual issue of what the job duties of the plaintiffs' positions are with the purely legal question of whether to characterize those duties as political and therefore unprotected by the First Amendment."); *Sowards v. Loudon County, Tenn.*, 203 F.3d 426 (6th Cir. 2000).

The Eighth Circuit has addressed the issue by concluding that the threshold political affiliation determination is a question of law, but acknowledged the confusion that exists among the circuits:

> We believe, however, that on the facts before us the SLA II position is excepted from the rule of *Elrod-Branti* as a matter of law. We note at the outset that not only do the parties dispute whether the appropriateness of political affiliation to a particular position is a question of law or fact, but courts themselves have disagreed whether the determination is one of law or fact. *See Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985) and cases cited therein. Even within this circuit a difference of opinion exists as to the nature of the question. *Compare Horton, id.* and *Hartley v. Fine*, 780 F.2d 1383, 1385, 1388 (8th Cir.

> 1985) (in jury trial, district court determined that plaintiff employee's position was non-policymaking) with *Barnes v. Bosley*, 745 F.2d 501, 508-509 (8th Cir. 1984), *cert. denied*, 471 U.S. 1017, 105 S.Ct. 2022, 85 L.Ed.2d 303 (1985) (in bench trial, district court's finding that political affiliation was not an appropriate requirement for plaintiffs' positions was not clearly erroneous) and *Gibbons v. Bond,* 688 F.2d 967, 968-69 (8th Cir. 1982) (same). We think that just as the non-policymaking, nonconfidential nature of the plaintiff road-graders' jobs was clear from the record in *Horton,* 767 F.2d at 478, so is the confidential nature of the SLA II position evident from the record before us. Thus the district court, on the facts of this case, erred in submitting to the jury the question of the appropriateness of party affiliation as a ground for dismissal.

Bauer v. Bosley, 802 F.2d 1058, 1062 (8th Cir. 1986).

Despite this majority viewpoint, the Third Circuit has created a morass of contradictory and incomprehensible opinions on the issue. Nowhere is the confusion and conflict among the decisions of the circuit courts more obvious than in the litany of cases emanating from the Third Circuit. In 1977, the Third Circuit in *Rosenthal v. Rizzo*, 555 F.2d 390 (3d Cir. 1977), reversed the district court, asserting that it erroneously weighed evidence and resolved conflicts of disputed facts in its effort to resolve plaintiff's status as a policymaker *vel non*. *Id.* at 392 n.3. The court in *Rosenthal* stated, in dicta, that *Elrod's* discussion of the criteria for determining who is a policymaker "reveals how difficult the

job of weighing evidence on that issue can be and, consequently, how inappropriate it is on a Rule 56 motion." *Id.* at 393 n.5, *citing Elrod*, 427 U.S. at 367-368. The Third Circuit concluded that plaintiffs who claim they are not policymakers are entitled to a trial on the issue. *Rosenthal* relied upon the snippet of the *Elrod* decision wherein the Court states that "political loyalty 'justification is a matter or proof, or at least argument, directed at particular kinds of jobs.'" *Elrod*, 427 U.S. at 368, *quoting Illinois State Employees Union v. Lewis*, 473 F.2d 561, 574 (7th Cir. 1972).

Judge Aldisert dissented in *Rosenthal* on the basis that the policymaking status *vel non* is a matter of law. *Rosenthal*, 555 F.2d at 394. There was, according to Judge Aldisert, agreement on the basic facts of what the plaintiff actually did, leaving the characterization of his position as the only remaining dispute. *Id.* at 395.

> Whether [the position] should be characterized as a policymaking position was not a remaining issue of basic fact, but an issue of ultimate fact, and therefore a matter of law for the court, and not the jury. "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S.Ct. 569, 574, 81 L.Ed. 755 (1937). Justice Frankfurter's explanation in *Watts v. Indiana*, 338 U.S. 49, 51, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801 (1949) has particular significance here:

> But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. (It is) important to distinguish between issues of fact that are here foreclosed and issues which though cast in the form of determination of fact, are the very issues to review which this Court sits.

Id. at 395 (emphasis added).

One would assume that the issue was settled within the circuit. To the contrary, four years after *Rosenthal*, the Third Circuit rendered its decision in *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981), affirming summary judgment in favor of the city and against the former city solicitor and assistant solicitors claiming they were fired for political reasons. The court in *Ness* attempted to disassociate from the *Rosenthal* position, stating that "[w]e did not there state that one's status as a policymaker could never be determined as a matter of law. Where, as a matter of law, a person is determined to have occupied a policymaking position, that person's claims to protection from patronage dismissal under *Elrod* and *Branti* are disposable on a motion for summary judgment." *Ness*, 660 F.2d at 522. Seemingly headed in the

right direction, the court held that "it is left to the *courts to decide* in any particular case whether 'party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *Id.* at 520 (emphasis added). However, the court in *Ness* was diverted off course when it held that there was no genuine dispute of material fact because, as a matter of law, the position was defined by statute as one for which political affiliation was appropriate. The Circuit Court has revisited its over-reliance in *Ness* on the statutory nature of the position to suit its purpose when it chooses to decide the question and ignore it when its purpose is not served. *See also Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) (employing the same reasoning and rationale to similar facts). Yet, the circuit courts readily cite to *Ness* for the broad proposition that the courts should decide whether political affiliation is an appropriate job requirement.

This contradiction is evident in *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986), where there was no direct discussion of the issue of fact versus law but the court concluded that an assistant director in the office of Public Information of Bucks County was a "confidential employee." This was not a statutorily defined position. Yet, contrary to *Armour*, the Court evaluated and weighed the opposing evidence of the duties and responsibilities of the position, finding them to be indicative of a position for which political affiliation is a requirement.

In *Zold v. Township of Mantua*, 935 F.2d 633 (3d Cir. 1991), the Third Circuit noted that the characterization of a position is fact specific, but does not label the *Elrod/Branti* exception as a question of fact. To the contrary, the Court relied upon *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) for the proposition that constitutional facts require independent examination by the appellate court. The

Third Circuit went on to reject the conclusion of the district court that the position of deputy township clerk was outside the scope of *Elrod* by weighing the functions of the office against the *Elrod* standards. The Court did not remand the case for the fact-finder to determine whether political affiliation was an appropriate requirement for the position, but decided that ultimate constitutional fact itself. The same result occurred in *Waskovich v. Morgano*, 2 F.3d 1292 (3d Cir. 1993). (Director of Veterans Affairs position was not protected by *Elrod/Branti*.)

The culmination of confusion created by the Third Circuit was reached on March 23, 1998, when two panels of the court issued opinions on separate political affiliation cases, *Wetzel v. Tucker*, 139 F.3d 380 (3d Cir. 1998) and *Boyle v. County of Allegheny, Pennsylvania*, 139 F.3d 386 (3d Cir. 1998). In *Wetzel*, the Court recognized that the inquiry as to whether a solicitor may be terminated on the basis of political affiliation is focused on the function of the office. *Id.* 139 F.3d at 384. Despite noting that there existed "competing contentions regarding both the general role of the [Municipal] Authority and the particular responsibilities of its solicitor," *Id.*, the Court reached its own conclusion that political affiliation was an appropriate criterion. In doing so, the Court rejected an argument that testimony by a county commissioner, questioning whether political affiliation was a requirement for the position, was relevant.

> Indeed, we believe that were such opinions sufficient to preclude summary judgment, it would raise the specter ... of permitting a plaintiff to avoid summary judgment simply by finding a commissioner, who may have any number of motives, to characterize the job one

> way or another, perhaps in view of changed political alliances.

Id. 139 F.3d at 386. Contrast this with another panel's decision in *Boyle*.

In *Boyle*, the Third Circuit rejected the district court's analysis of the undisputed functions of a Deputy Director of Marketing and Communications and remanded the case to the jury, solely because two of the county commissioners had responded negatively during their depositions when asked whether political affiliation was a requirement for the job. (One of those commissioners was the minority Democratic commissioner). Why the district court could appropriately rely on the functions of the position in question in *Wetzel* but not in *Boyle*, is not explained. Why opinion testimony is relevant or can be weighed in *Boyle* but not in *Wetzel*, is not explained. More importantly, the Third Circuit does not explain what question is to be presented to the fact-finder. Even in *Boyle*, the Court refers to the concept of "constitutional facts," but appears to leave the ultimate *Elrod/Branti* inquiry -- whether political affiliation is a legitimate requirement for a position -- to the jury. Is this the question to be posed to the jury? If so, it is clearly outside the province of the jurors. Since *Rosenthal*, *Boyle* seems to be the anomaly. In every other case, the Circuit Court has decided the constitutional fact. It has weighed the evidence and reached an ultimate conclusion as to whether political affiliation is an appropriate requirement for a position. Although ostensibly dealing with the summary judgment standard, until *Boyle*, the Court had not seen fit to remand a case to the fact-finder. Even in *Boyle*, the Third Circuit scrambled to justify its decision by categorizing the case as "out of the realm." *Boyle*, 139 F.3d at 397. Why the Third Circuit chose to extend its extraordinary holding to *Armour*

and revert to a standard that it had not followed in twenty years can only be explained by an over-reliance upon formulaic language to the exclusion of fundamental reasoning.

The Third Circuit, in the case *sub judice* and in prior cases, has pulled language from *Elrod* and *Branti,* allowed that language to become dogma without any underlying foundation, and in this case, created a new standard. Justice Holmes cautioned against just such a result in *Hyde v. U.S.*, 225 U.S. 347, 384 at 391 (1912), when he stated "[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provide further analysis." The Third Circuit has taken Justice Brennan's observation that the inquiry into the nature of the responsibilities and the function of a given position as particularly fact-specific, *Elrod*, 427 U.S. at 367-368, and contorted it into a factual issue as to whether political affiliation is an appropriate requirement for a position. (App. C at 28a) In reciting the mantra of "issues of fact," the Court of Appeals repeatedly and clearly leaves the ultimate question of law to the jury. (Armour's attendance at meetings and casting votes on Schulte's behalf "might be interpreted to support more than one inference regarding the level of representation inherent in the position," App. C at 36a; the creation of an Administrative Assistant position, that was not filled, "might lead a fact-finder to doubt that a secretarial position was one for which political affiliation was a proper ingredient," App. C at 37a; Armour's "access to information...might signify that political affiliation...is a job requirement. (citation omitted) However, on the record before us, we are unable to so conclude without weighing the evidence -- a task that we leave for the fact-finder." App C at 39a.) The ultimate inquiry to the Third Circuit remains the same - what is the question to be answered by the jury? The

record does not evidence disputes of fact as to Armour's functions as personal secretary to Commissioner Schulte, only the potential for any eight people to view those functions differently. The Court of Appeals is not asking the jury to decide whether Armour attended meetings and voted in Schulte's stead – that is not disputed. The Court is asking the jury to decide whether that function and others equate to a politically sensitive position. As noted previously, this is the only situation in which the Third Circuit, or any court of appeals, would allow a jury to determine whether conduct, or in this case a position, has constitutional protection. Yet, the Third Circuit has carved out this exception with no justification and provided no guidance.

No other circuits have created the labyrinth of decisions that remain unreconciled in the Third Circuit. However, the Fifth, Seventh, and Tenth Circuits are more closely aligned with the *Rosenthal* and *Boyle* line of decisions. The Fifth Circuit in *Stegmaier v. Trammell,* 597 F.2d 1027, 1034 n.8 (5th Cir. 1979) noted the *Elrod* decision for the proposition that the political loyalty justification is a question of fact for the jury. In 1985, the Seventh Circuit decided that a determination of the *Elrod/Branti* exception was a question of fact for a jury. The basis for the Seventh Circuit's position is that an analysis of the duties of a position is a factual issue, and facts are for the jury. *Soderbeck v. Burnett County, Wis.*, 752 F.2d 285 (7th Cir. 1985). Similar to *Ness*, in *Kline v. Hughes*, 131 F.3d 708 (7th Cir. 1997), the position was statutorily defined and therefore found by the court to be, as a matter of law, a position for which political affiliation was an appropriate requirement. While the application of *Elrod/Branti* was decided by the court, the decision was based upon the summary judgment standard.

The Tenth Circuit acknowledged the split in the circuits on this issue in *Dickeson v. Quarberg*, 844 F.2d 1435, 1443 n.7 (10th Cir. 1988). In *Dickeson*, the court chose not to decide the issue of whether the *Elrod/Branti* exception was a matter of law or fact because the facts were undisputed and therefore the question could be disposed of as a matter of law on summary judgment. Twelve years later, in *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), the court held that whether political association is an appropriate job requirement is a question of fact, but provided no rationale or authority for this conclusion. *Id.* at 1138. Yet, summary judgment was granted on the basis that no dispute existed as to the duties of the position of administrative assistant to the city manager.

The Ninth Circuit sits on the fence between the opposing views of the split in circuit decisions. In *Diruzza v. County of Tehema*, 206 F.3d 1304 (9th Cir. 2000), the Ninth Circuit aligned itself with the Third, Sixth and Tenth Circuits. The Court reversed the district court's grant of summary judgment, finding "material facts in dispute regarding the duties actually performed by the plaintiff," but rather than deny summary judgment and send the disputed facts to the jury, the court remanded the case to the district court for a "determination of whether her actual duties were those of a policymaker." *Id.* at 1306.

The circuit court decisions clearly demonstrate a conflict among the circuits on an "important matter" - whether the application of the *Elrod/Branti* exception to political patronage dismissals is a question of fact or law. This issue is ripe for guidance from this Court. The alternative is to continue to develop a patchwork of decisions that provide no direction to the courts charged with applying

the law or the government employers charged with following the law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-3431

[Dated December 20, 2001]

DELORES ARMOUR,	)
Appellant,	)
	)
v.	)
	)
THE COUNTY OF BEAVER,	)
PENNSYLVANIA; BEA SCHULTE,	)
Commissioner, in her individual capacity.	)
	)

Present:

BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY,AMBRO, FUENTES, Circuit Judges, POLLAK, District Judge.[1]

[1] The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sat by designation. His vote is limited to panel rehearing only.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellees having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

Chief Judge Becker, Judge Scirica, and Judge Nygaard would have granted the petition.

BY THE COURT:

/s/_____
Circuit Judge

DATED: DECEMBER 20, 2001

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 00-3431

[Dated November 21, 2001]

DELORES ARMOUR, Appellant,	)
v.	)
THE COUNTY OF BEAVER, PENNSYLVANIA; BEA SCHULTE, Commissioner, in her individual capacity.	)

On Appeal From the United States District Court
For the Western District of Pennsylvania
Chief District Judge: Hon. Donald E. Ziegler
D.C. No. 99-cv-00669

Before:
SCIRICA and AMBRO, *Circuit Judges*, and POLLAK, *District Judge*.*

* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on December 12, 2000.

On consideration whereof, it is now hereby ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered on March 30, 2000, be, and the same is hereby reversed and the case is remanded to the District Court for further proceedings consistent with this opinion. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/_____
Clerk

DATED: November 21, 2001

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-3431

November 21, 2001, Filed

DELORES ARMOUR,
Appellant

v.

THE COUNTY OF BEAVER, PENNSYLVANIA, BEA SCHULTE, COMMISSIONER, in her individual capacity,
Appellee

On Appeal From the United States District Court
For the Western District of Pennsylvania
D.C. No. 99-cv-00669
Chief District Judge: Hon. Donald E. Ziegler

JUDGES:
Before: SCIRICA and AMBRO, Circuit Judges, and POLLAK, District Judge.* SCIRICA, Circuit Judge, dissenting.

OPINION OF THE COURT

POLLAK, District Judge.

In this case, plaintiff-appellant Delores Armour claims that her First Amendment rights were violated when she was fired from her position as secretary to defendant-appellee Bea Schulte, then a County Commissioner of defendant-appellee Beaver County, Pennsylvania ("the County"). Armour contends that she was terminated because of her political beliefs, and hence that her termination contravened the general rule against political patronage dismissals established in *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) and *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980). The District Court granted summary judgment in favor of the County and Schulte, on the ground that the County and Schulte had satisfied the burden of establishing that political affiliation was an appropriate requirement for the secretarial position. Additionally, the District Court found, *sua sponte*, that appellant had failed to adduce sufficient evidence to enable a fact-finder to infer that her termination was politically motivated--i.e., to infer that, as Armour contended, Schulte decided to terminate her based on the perception that Armour was supporting a candidate

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* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

other than the one backed by Schulte in a campaign for a local judgeship.

For the reasons that follow, we reverse.

I. Factual and Procedural Overview

Armour and Schulte met when Armour volunteered to work on Schulte's 1995 campaign as a Democratic candidate for the office of County Commissioner. Armour was one of a number of people working on Schulte's campaign. As part of her involvement in the campaign, Armour attended campaign committee meetings, traveled with Schulte to polling locations and political functions, attended fund-raising events, and placed Schulte's signs throughout the voting district. After winning the election, Schulte offered to hire Armour as her secretary. Armour accepted and began her employment as Schulte's secretary in January 1996. According to Armour's deposition testimony, once hired, she relinquished her political role and turned her attention to the clerical tasks of the job, at least during work hours. Armour testified that she spent approximately half of her time working for Schulte and that, in the balance of her time, Armour--like the other commissioners' secretaries--performed clerical tasks under the supervision of the Chief Clerk of the County. Armour testified that in January, 1999, Joseph Askar, a Democrat seeking election to a local judgeship, approached her with logistical questions about running a campaign; she answered Askar's questions but took no other action on his behalf. The parties agree that in early February Schulte learned of Armour's contact with Askar--who was running against the Democratic candidate supported by Schulte and the local party establishment--and questioned Armour about

her involvement with Askar's campaign.

At about the same time, Armour proposed that the County create a human service coordinator position and hire her for the position. Schulte testified that she raised the possibility with the other commissioners and that they decided against creating the position. Instead, in late February, 1999, Schulte offered Armour a part-time clerical position at a geriatric center earning a lower salary and asked Armour to go home and think about the offer.[1] The next day Armour took a personal day off. The testimony of Schulte and Armour indicates that, on February 26, when Armour was next in the office, Schulte asked Armour whether she had made a decision about taking the geriatric center position. Schulte testified that "[Armour] told me that I would have to speak to her attorney." Armour testified that she told Schulte that "if [Schulte] had some work for me to do I'd be more than happy to go back to her office, but if it was about the job offer, I was requesting she wait until my attorney was present to discuss it." App. at 77 (Armour Dep. at 101). The parties are in agreement that Schulte then advised Armour that she was terminated.

Armour filed suit under 42 U.S.C. §1983 in the United States District Court for the Western District of Pennsylvania against the County and also against Schulte in her individual capacity. The County and Schulte moved for summary judgment on the ground that political affiliation was

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[1] Schulte testified that she did not know at the time that the position was part-time; however, Armour testified that she, Armour, was aware that the position was part-time when it was offered.

an appropriate job requirement for the position of secretary to a Beaver County Commissioner. In their summary judgment motion, appellees acknowledged that the question whether Armour was fired based on her political affiliation "involve[s] disputes over issues of material fact best left for trial." The District Court granted summary judgment in favor of Schulte and the County based both on the appropriateness of a political-affiliation job requirement and on the lack of evidence that Armour's political affiliation was the cause of her termination.

II Standard of Review

We exercise plenary review of the District Court's decision to grant summary judgment. *See Assaf v. Fields*, 178 F.3d 170, 171 (3d Cir.), *cert. denied*, 528 U.S. 951, 145 L. Ed. 2d 292, 120 S. Ct. 374 (1999). In doing so, we must apply the same test that the district court must apply. *See Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.)(en banc), *cert. denied*, 483 U.S. 1052, 97 L. Ed. 2d 815, 108 S. Ct. 26 (1987). Reviewing the record as a whole, we will "draw all reasonable inferences in favor of the non-moving party" and will not weigh the evidence or make credibility determinations. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). If it appears that "there is no genuine issue as to any material fact" and the movant is entitled to judgment at a matter of law, we will affirm a grant of summary judgment. Fed. R. Civ. P. 56(c). Of course, we will give credence to " 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.' " *Reeves*, 530 U.S. at 151 (quoting *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 300, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

In lawsuits such as the present one, in which the plaintiff is a government employee raising a First Amendment political discharge claim, the usual standard of review for grants of summary judgment is modified in that it is up to the defendant government employer to prove that political affiliation is an appropriate requirement for the job. "Since... it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification" rests with the government employer. *Elrod*, 427 U.S. at 368. Moreover, in *Zold v. Township of Mantua*, 935 F.2d 633 (3d Cir. 1991), we invoked the principle that, when the First Amendment is implicated, appellate courts have a special responsibility to undertake an exacting review of the whole record with a particularly close focus on facts that are determinative of a constitutional right. *Id.* at 636 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) and *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3d Cir. 1986)).

III Review of the Record

Before undertaking an analysis of the legal issues presented on this appeal, we will set forth (1) the principal record evidence regarding the nature of Armour's secretarial position, (2) the principal record evidence regarding the reason or reasons for Armour's termination, and (3) the District Court's rationale for granting summary judgment in favor of appellees.

A. The Nature of the Secretarial Position

None of the parties contends that Armour was a policy-maker in her position as secretary to Schulte. But the parties disagree as to the level of confidentiality, loyalty, and political trust required in the position. There are three Beaver County Commissioners. At the time in question, there were two Democrats--Commissioner Schulte and Commissioner Dan Donatella--and one Republican--Commissioner Nancy Loxley. Joann Clarke was Donatella's secretary and Jo Johnson was Loxley's secretary.[2] According to the testimony of Donatella, although as a formal matter all three commissioners had joint authority over personnel decisions regarding the commissioners' secretaries, it was understood among the commissioners that each commissioner had the power to hire and fire his or her own secretary.

The three secretaries shared the same office space and, depending on availability, they would perform routine tasks for any one of the commissioners. Armour testified that she devoted fifty to sixty percent of her time to performing work for the Chief Clerk. Clarke testified that tasks assigned to her by the Chief Clerk filled approximately sixty percent of her working hours. In working for the Chief Clerk and in working for the commissioners, the secretaries spent the bulk of their time performing such clerical tasks as typing correspondence, resolutions and motions; answering phones; greeting and directing visitors to the office; handling paperwork; opening mail; making photocopies; making travel

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[2] Clarke and Johnson were both hired by previous commissioners and then retained by Donatella and Loxley, respectively.

arrangements; scheduling meetings; filing documents; directing checks to the proper departments; and obtaining signatures. Armour also scheduled the board meetings which required the presence of the entire board, made photocopies of all mail received that was relevant to the entire board, and took minutes at public board meetings when Johnson was not available to do so. Additionally, she attended monthly meetings of the Aliquippa Family Preservation Network ("AFPN") in Schulte's stead. At these meetings she took notes and voted as Schulte's proxy. In testimony, Armour described her role at those meetings as follows:

> [I]t was not a real important board, they didn't really deal with a lot of issues other than trying to get themselves established and there were things that would have to be voted on, like paying the bills, this person going to conference or whatever. I didn't sit in on the executive board and have privy to the decision making, but the regular minutes, if it called for a vote, yes.

App. at 69 (Armour Dep. at 48). As to Armour's participation in the AFPN meetings, Schulte testified: "[A]t the time I didn't realize that she had the power to vote, but I found out later that she was, indeed, voting in my stead." App. at 54 (Schulte Dep. at 21). Armour maintained in her deposition testimony that, although she did not end her own political involvement, she stopped accompanying Schulte to political functions at the close of the 1995 campaign. Also, Armour testified that none of the secretaries was privy to personnel matters or files; the testimony of Clarke and

Johnson is not to the contrary.[3]

In 1996, Armour suggested that a position of office manager for the commissioners be created and that she be appointed to the position. Schulte testified that she proposed this to the other commissioners but that they were not in favor of the idea. App. at 56 (Schulte Dep. at 31)("I'm sure they did not want to have their secretaries subject to my secretary."). In 1997, the commissioners decided to create an executive administrative position directly under the commissioners and on par with the Chief Clerk. In her testimony, Schulte emphasized that the person in the executive administrative position, as that position was envisioned, would have performed "strictly executive administrative-type duties and . . . represent the commissioners." The position was created and funded but never filled because, according to Schulte's testimony, the commissioners could not decide on who should be hired. Moreover, it seems that Armour was not seriously considered for this position because the commissioners had decided that a college degree--which Armour did not have--was a requirement for the job. Schulte testified:

> Delores' husband called me and wanted to know why we had included a requirement for a college degree for that position, because that eliminated Delores from consideration. . . . I told him that I included--had included that requirement, because this person would,

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[3] However, when enumerating his secretary's duties in deposition testimony, Donatella mentioned that his secretary had some involvement in payroll.

> indeed, be representing the three commissioners, and we felt that was a necessary--all the commissioners had agreed that would be a necessary requirement.

App. at 56 (Schulte Dep. at 32).

On March 11, 1998, Armour completed a document entitled "Class Specification Review & Comment". Directions for completing the form stated, in pertinent part:

> Please review the attached classification specification to make sure it accurately describes the body of work you perform. Please note that in many cases, it will not identify every task that you specifically perform. When you see the words: *May perform other duties, including work in other functional areas* this means that within the list of duties you should find the essential duties that you regularly perform.
>
> If you believe some essential duties have been omitted, or a part of the specification is inaccurate; please indicate this below.

App. at 93 (emphasis in original).

Appellant typed the following response on the space provided:

> Although this job may appear secretarial in nature, a large portion of the duties fall more

> towards administrative assistant. The high level of confidentiality and responsibility reaches far beyond the desk, often into our personal lives. A broad background in County government is essential for even the entry level of this position.

Id.

The form was signed by Armour and initialed by Schulte. In deposition testimony, Armour explained this statement by saying: "[T]he concept I was trying to get across was what I thought the job should be more so than what the job actually is." Asked whether she viewed her position as a confidential position, Armour testified: "I viewed it as a secretary. Of course all secretaries have some confidence to their boss, regardless of their position." App. at 69 (Armour Dep. at 49). Asked if she would describe the position as requiring a high degree of confidentiality, Armour responded, "I would say normal." *Id.*

Armour's description of the position in her deposition testimony stands in some tension with the statements of other witnesses. Schulte testified that Armour was privy to confidential material through her access to lists of resolutions and motions from commissioners' meetings, correspondence among commissioners, Schulte's telephone calls, and her personal calendar. Schulte also testified that Armour "would often talk to department heads setting up meetings and explaining the purpose of the meeting. That was a very important part of her function. If she didn't understand the purpose of the meeting, then she couldn't explain it, and often the meetings were involving confidential matters." App. at 54 (Schulte Dep. at 21-22).

When asked to describe the secretarial position, Donatella testified as follows:

> The secretary obviously in that capacity works very close with the county commissioner whom she's affiliated with because of the fact that you need a good close relationship. As a matter of fact, I do believe that they were classified as confidential secretaries and not come under the realm of the union, because each commissioner was at liberty to select that particular employee because of the relationship that they needed to maintain.

App. at 44 (Donatella Dep. at 6).

Donatella also testified, with respect to the duties that his secretary performed:

> She does everything from answering the telephone for me to doing confidential letters, even sometimes arranging meetings. Doing not only my clerical work, but frankly, operating as my eyes and ears, both political and otherwise. She helps me even on the political end of it, arranging for different political functions and so forth.

Id. (Donatella Dep. at 6-7). There may, however, be room for more than one interpretation of Donatella's testimony regarding the nature of the secretarial position. For example, Donatella testified:

> [B]asically, they do everything that any other confidential secretary would do as far as even running the office side is concerned. They do resolutions, they get signatures, payroll, act as receptionist, they do typing and all the other secretarial skills that's required.

Id.

Asked to explain what he meant when he said the secretaries "do resolutions," Donatella clarified his testimony by stating that the resolutions are prepared by the law department and the secretaries' responsibilities are limited to (a) ensuring that the commissioners sign the completed resolutions and (b) mailing the resolutions to the proper places.

When Donatella was asked whether political affiliation was required for a commissioner's secretary, he testified:

> Well, I don't know if it's a requirement, no; but mainly, it is associated with that because on the campaign trail, usually those people are directly or indirectly involved in the campaign, helping that individual to be elected. But I have seen where sometimes someone is selected that is not involved in the campaign. . . . It's whomever that commissioner feels comfortable with I think is the bottom line. They have to be capable of doing the job at hand, and it always helps to be politically astute, obviously.

Id. at 45 (Donatella Dep. at 9). Amplifying the connection

between politics and the secretarial position, Donatella explained:

> [G]enerally, if a Republican is a commissioner, they are going to hire a Republican secretary and the other way around. I don't know of any case where it was other than that. I do [not] remember a Democrat hiring a Republican or vice versa, at least to my knowledge in the 35 years I was there. They are generally the same party, if that's the question.

Id. (Donatella Dep. at 10).

The testimony of Johnson, secretary to Commissioner Loxley, reinforces appellees' argument that Armour's position required a significant level of confidentiality: "The work that I do for Nancy [Loxley] I would consider to be of a confidential nature, not so much the general work that I do for [the Chief Clerk] . . ." App. at 85 (Johnson Dep. at 36). With respect to her work for Loxley, Johnson testified: "[I]t's a political atmosphere here, and Nancy would often times talk to me in confidence about political issues, party issues that I would have to keep to myself and not be able to share with anybody else." *Id.* However, portions of Johnson's testimony indicate some question as to the substance behind her more general assertions regarding the nature of the job. Asked whether there were any other sources of confidential information beyond the above referenced conversations with Loxley, such as letters or phone calls, Johnson testified: "No. Her correspondence that she got in typically, unless it was something political in nature, if it was county related, all three

commissioners would get the same correspondence." *Id.* Additionally, Johnson testified that she had not been questioned about her political affiliation during her interview for the position, that she did not consider herself a political adviser, and that her political affiliation did not play any role in her ability to keep information confidential. Johnson also provided an affidavit in which she stated that Armour used to identify herself as Schulte's "confidential secretary" when she answered the phone. However, Armour denied having so identified herself.

Clarke, Donatella's secretary, testified that "my responsibility, of course, is to represent [Donatella] and to keep all confidentiality". App. at 89 (Clarke Dep. at 9). Clarke's testimony brings into focus the seeming ambiguity of the term "represent" as used by the parties and witnesses. Asked about her participation in active campaigning, Clarke testified that she served as Donatella's campaign treasurer (usually performing these tasks during evening and weekend hours) and would assist Donatella with his campaign at his request: "I represent Commissioner Donatella mainly when I am anywhere politically. I'm there basically to assist him, if that's--you know, if I am to represent him at a function or if I am to be there just to be, you know, part of the event." App. at 91 (Clarke Dep. at 34). Additional questions on this topic resulted in the following exchange:

> Q: Do you consider yourself to be a political advisor to [Donatella]?
>
> A: Inform him of happenings or go in his behalf? I don't understand.

> Q: Do you advise him on policies for the county?
>
> A: No.
>
> Q: But you occasionally go to functions on his behalf?
>
> A: Not for him. Basically, I will go part of.
>
> Q: Do you go to tell him what happened at the functions, or what do you mean?
>
> A: No, I don't, I go just to represent him, be present, that if -- there may be five or six events going on in one evening, and so he's represented.
>
> . . .
>
> Q: Okay. Do you give speeches or anything of that nature at those kinds of functions?
>
> A: No.

Id. (Clarke Dep. at 34-35).

B. The Reason for Armour's Termination

We now turn to the evidence in the record regarding the reason for Armour's termination.

Armour contends that rumors of her involvement with Joseph Askar's campaign for District Justice in Centre Township motivated Schulte to fire her. It is undisputed that Schulte was aware of such rumors. According to Armour's testimony, in January 1999, while Armour was still employed as Schulte's secretary, Askar, a Democrat, approached Armour with questions about the mechanics of conducting his campaign. Armour contends, and appellees do not dispute, that she merely answered Askar's questions on topics such as how many signs were required to cover a certain voting district. It appears to be undisputed that Schulte was told in early February, 1999 that Armour intended to support Askar instead of Joseph Zupsic, the Democratic candidate supported by Schulte. Donatella testified that he and Schulte were present at a rally when someone told Donatella "that I'd better find Bea Schulte because Joe Schaffer, the town chair, was extremely upset because allegedly Dee [Armour] was working for Joe Askar." App. at 47 (Donatella Dep. at 20). Donatella testified further:

> So I went and found Bea and I said, "Bea, there's a problem, I think you better go talk to Mr. Schaffer because he is saying that your employee is working for Joe Askar." So I escorted her over to Mr. Schaffer and Mr. Zupsic, who was the other candidate, and they confronted her with and accused her that Dee [Armour], her employee, was working for Mr. Zupsic's opposition. Bea's comment in my presence was that she would find out about what was going on, she was not aware of that but she would talk to Dee.

Id. It is undisputed that on one occasion early in February of 1999, Schulte did question Armour about her involvement in Askar's campaign. Armour testified that Schulte called her into Schulte's office and said: "I'm getting flak over you supporting Joe Askar." App. at 70 (Armour Dep. at 53). According to Armour, Schulte asked a number of questions about Armour's involvement with Askar's campaign. For example, Armour testified that Schulte asked her whether she was holding "coffee klatches"--small grass-roots meetings to introduce a candidate to voters--for Askar, and that in reply she had explained that she was not involved in Askar's campaign but had answered some simple questions. Later that day, Armour approached Schulte and told her that she was upset about being questioned about what she did in her personal time. Some two to three weeks later, on February 26, 1999, Schulte discharged Armour.

Despite his acknowledgment that there was concern regarding Armour's possible involvement with Askar's campaign, Donatella testified that he was not under the impression that Armour's termination was related to her perceived support of Askar, nor had he heard rumors that Armour lost her job for that reason. Rather, Donatella testified that he attributed Armour's termination to a deterioration of the relationship between Armour and Schulte that, according to Donatella, had begun approximately six months prior to Armour's termination.

C. The District Court's Opinion

With the foregoing synopsis of the record in view, we turn to the District Court's ruling granting summary judgment in favor of Schulte and the County. The District Court made

the following assessment of Armour's testimony about the nature of her position:

> Plaintiff completed [the March 11, 1998] job description [in which she described the position as entailing a "high level of confidentiality"] before any alleged problems between herself and Schulte. We thus consider her deposition testimony [in which she described the position as entailing a "normal" level of confidentiality] as contradictory and her unbiased statement regarding her job duties as provided in March 1998 as more significant. *See, e.g., Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705-06 (3d Cir. 1988)(permissible for district court to disregard subsequent contradictory affidavit for purposes of determining whether there was a material dispute of fact).

Mem. Op. at 10.

The District Court proceeded to hold that appellees had carried their burden of establishing that political affiliation was properly required for the secretarial position:

> We find that plaintiff's party affiliation was an appropriate requirement for the effective performance of the job. *See* [*Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981); [*Brown v. Trench*, 787 F.2d 167, 170 (3d Cir. 1986); *Waskovich v. Morgano*, 2 F.3d 1292, 1303 (3d Cir. 1993); *Roseman v. County of Cambria*,

862 F. Supp. 19, 21 (W.D. Pa. 1993); *see also Williams v. City of River Rouge*, 909 F.2d 151, 153 n.4 (6th Cir. 1990)(political affiliation is more than party politics, it is about trust, confidence, and sharing a common viewpoint with those to whom authority is delegated). Plaintiff acted as liaison between department heads and Schulte, which required knowledge of confidential matters. She also had access to correspondence containing party issues and confidential material. Commissioner Donatella noted the importance of loyalty and the necessity of a close relationship between the commissioner and secretary. Johnson described the office as a political atmosphere, and Clarke acknowledged that she "represents" Commissioner Donatella at political events.

Plaintiff testified that she responded to constituent calls and handled the matter before involving Schulte. Each time plaintiff responded to a concern of a constituent, she was representing Schulte in a political nature. *See, e.g., Brown*, 787 F.2d at 170 (while some of [plaintiff's] duties were only technical or clerical in nature, her principal duty was to act as spokesman for the Commissioners). It is likely that Democratic constituents who seek redress from their Democratic commissioner, or simply express concerns of a political nature, expect that the commissioners' secretary shares their political ideology. In other words, Democratic constituents should

> find comfort in expressing their concerns to the commissioner's secretary, whom the voters felt would express or relay the issues accurately and compassionately to the commissioner. In essence, plaintiff was a conduit between the Democratic constituents and Commissioner Schulte, their elected representative. *See Waskovich*, 2 F.3d at 1299-1300, quoting *Hall v. Ford*, 272 U.S. App. D.C. 301, 856 F.2d 255, 263 (D.C. Cir. 1988)("high level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their superior's policies, and perceived by the public as sharing their superiors' aims").

Plaintiff attended meetings on behalf of Schulte, voted in her stead, and attended political functions with the Commissioner. Her own job description elevated the position to one of "administrative assistant." Based on the evidence of record, we find that an absence of political cohesion would undermine the working relationship between plaintiff and Schulte. *Cf. Burns v. County of Cambria, Pennsylvania*, 971 F.2d 1015, 1022-23 (3d Cir. 1992). We find that defendants have established that political affiliation is an appropriate job requirement for plaintiff's position.

Mem. Op. at 10-12.[4]

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[4] Armour testified that she did not accompany Schulte to political functions once she was hired as Schulte's secretary.

Additionally, the District Court held that Armour did not establish the causation elements of the test set forth in *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995)(plaintiff must prove "that the employee maintained an affiliation with a party" and "that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision"). First, the District Court held that Armour's actual political affiliation with Askar was insufficient to meet the *Robertson* test because that connection "was minor." Mem. Op. at 13. Second, the District Court held that Armour's argument that her "'perceived' political affiliation with Askar's campaign was a substantial or motivating factor in Schulte's decision to terminate her" was "without merit" because Schulte questioned Armour about her involvement with Askar's campaign on only one occasion. *Id.* Finally, the District Court credited testimony of Donatella and Schulte that indicated that Armour was fired because her relationship with Schulte had deteriorated independently of any tensions that were caused by Armour's perceived connection with Joseph Askar.

III Discussion

First, we will consider whether, as the District Court held, the record on appellees' motion for summary judgment mandated a finding that political affiliation was an appropriate requirement for Armour's job. Second, we will consider whether, as the District Court held *sua sponte*, appellees were entitled to summary judgment on the alternate ground that Armour had failed to present any significant evidence that her firing was attributable to political affiliation.

A. Armour's Job

At least at one time--namely, during Schulte's 1995 campaign--Delores Armour's relationship with Bea Schulte could have been characterized as political in nature. It is less clear that Armour's position as secretary to Schulte required a shared political purpose. The question before this court is whether defendants have established, beyond factual dispute, that political agreement was an appropriate requirement for the position of secretary to a Beaver County Commissioner.

Adverse employment actions against government employees that are based on political affiliation are, as a general rule, prohibited. *See O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 135 L. Ed. 2d 874, 116 S. Ct. 2353 (1996); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990); *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980); *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976). In *Elrod*, a plurality of the Court first announced this rule based on the recognition that political patronage dismissals run counter to the First Amendment rights of free speech and political association. *See Elrod*, 427 U.S. at 359. At the same time, the Court delineated a narrowly drawn exception for particular positions for which political affiliation is found to be an appropriate requirement. Applying the intermediate "exacting" level of scrutiny, the Court explained: "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Id.* at 362; *see Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386, 395 (3d Cir. 1998). The notion of what constitutes a position for which political affiliation may acceptably be required has

developed over time. In *Elrod*, the Court adopted an approach that distinguished between policymaking and non-policymaking positions. Reiterating the rule in his concurrence, Justice Stewart advised that political affiliation could not provide a basis for adverse actions taken against a "nonpolicymaking, nonconfidential government employee". *Id.* at 375 (Stewart, J., concurring). The Court described the inquiry into the nature of the responsibilities and the function of a given position as particularly fact-specific. *Id.* at 367-68.

In *Branti*, the Court revised the *Elrod* test to lessen the emphasis on determinations of whether a position entails policymaking and confidentiality: "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Justice Stevens, speaking for the Court, stated: "Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Id.* at 518 (providing an example of a scenario in which "a State's election laws require that precincts be supervised by two election judges of different parties"). He continued: "It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position." *Id.* (giving the example of a football coach for a state university).

> On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to

> the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.

Id. The *Branti* Court also reiterated that in order for a patronage dismissal to pass constitutional muster, it must forward a governmental purpose:

> The plurality [in *Elrod*] emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U.S. at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis, cannot be expended for the benefit of one political party simply because that party has control of the government.

Branti, 445 U.S. at 517 n.12. The requirement of a governmental purpose to support political patronage reflects the core holding of *Elrod* and *Branti* that a long tradition of political patronage cannot, in itself, immunize politically motivated dismissals from scrutiny.

We have had numerous occasions to apply these principles. In *Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386 (3d Cir. 1998), we charted the development of Third Circuit case law interpreting the *Elrod* /*Branti* test. The

Boyle court canvassed *Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981)(adopting a "functional analysis" under which a dismissal was permissible where a difference in party affiliation would "be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office"), *Brown v. Trench*, 787 F.2d 167, 168 (3d Cir. 1986)(refining the *Elrod/Branti* test by focusing the inquiry on "whether the employee has meaningful input into decision making concerning the nature and scope of a major [governmental] program")(internal quotation marks omitted), and *Zold*, 935 F.2d at 636 (synthesizing prior decisions and holding that appellate courts are obligated to "make an independent examination of the whole record" with "special scrutiny").

We noted in *Boyle*, 139 F.3d at 396, that because the *Elrod/Branti* test is flexible and entails an extremely fact-intensive inquiry, cases such as the case at bar resist easy generalizations. In the case at bar, we must determine whether the District Court's grant of summary judgment was correct as to the appellant--a nonpolicymaking, secretary-clerk serving in roughly equal parts an elective county executive (County Commissioner) and a non-elective county administrator (Chief Clerk). Unsurprisingly, none of our prior cases carries us effortlessly to a resolution; however, we find particular guidance in *Brown* and *Zold*.

Brown arose from the dismissal of a county assistant director of public information. In that case, we discussed the difficulty of determining the appropriateness of political-affiliation requirements for jobs that entail clerical tasks:

> While *Branti* provides us with a "test" the Supreme Court has not specified the particular factors which indicate that a position falls within the *Branti* test. Factors suggested by other courts include whether the employee's duties are simply clerical or related to law enforcement, nondiscretionary or technical. Courts have also considered whether the employee participates in Council discussions or other meetings, whether the employee prepares budgets, or has authority to hire or fire employees, the salary of the employee, and the employee's power to control others and to speak in the name of policymakers. In *Crisp* [*v. Bond*, 536 F. Supp. 137, 139 (W.D. Mo. 1982)], the Court held that the Assistant Director of the Division of Motor Vehicle and Drivers Licensing could not be fired because he had no confidential duties even though he supervised employees, prepared the budget, was liaison with the public, attended conferences, and analyzed administrative procedures and work standards. The key factor seems to be not whether the employee was a supervisor or had a great deal of responsibility but whether the employee has "meaningful input into decision making concerning the nature and scope of a major township program."

Brown, 787 F.2d at 169-70 (citations omitted). In *Brown*, we concluded: "While some of [Brown's] duties were only technical or clerical in nature, her principal duty was to act as

spokesman for the Commissioners and help promote county projects. Brown could, therefore, be dismissed because of her political affiliation without any violation of her first amendment rights." *Id.* at 170.

In *Zold*, a deputy township clerk challenged her politically motivated dismissal. We reversed the district court's grant of summary judgment in favor of the township and remanded the case for further proceedings. We observed that the district court appeared to rely on three job functions in finding that political affiliation was a proper job requirement for the deputy clerk position: (1) secretary of the Township Committee, in which capacity the deputy clerk could have access to confidential information during closed sessions; (2) liaison officer between government officials and taxpayers and between the executive and the general body of municipal personnel; and (3) public relations figure. *See Zold,* 935 F.2d at 637. We distinguished the public relations work performed by Zold from that conducted by the appellant in *Brown* based on the fact that Zold was not responsible for writing press releases and speeches of elected officials, or for promoting county projects, or for acting as spokesperson for the county commissioners before the press and public. *See id.* at 638. Instead, we reasoned:

> Her contact with the press is generally limited to informing reporters about the agenda of upcoming meetings, and her contact with the public is, as the district court put it, "receiving inquiries and complaints from the electorate and responding in kind," 737 F. Supp. at 317, rather than promoting policies. Therefore, *Brown* does not provide a basis to conclude

> that the deputy clerk's political affiliation is a job requirement.

Id. (citations omitted).

Additionally, we found that the deputy clerk's access to confidential material did not justify a political affiliation job requirement; however this holding was narrowly tailored to the circumstances of *Zold*:

> Arguably, even though there is no evidence that the clerk or the deputy clerk acts as anything other than a functionary during the closed Committee meetings, the access to confidential information which may be discussed on these occasions might signify that political affiliation, translated in this case into loyalty to the majority party, is a job requirement. Nor do we deny that there is some sensitivity and discretion which must be exercised when the deputy clerk is acting as a liaison or as a spokesman. However, these factors cannot serve to demonstrate the need for party affiliation because virtually all of these functions are duties that the deputy assumes from the clerk. State law makes clear that political affiliation is not a factor in the municipal clerk's position.

Id. at 638. Hence, we stated that "we cannot conclude that duties fulfilled by a tenured, nonpolitical appointee suddenly become confidential or political on those occasions when the deputy clerk is called to substitute for him." *Id.*

Finally, we observed:

> The defendants have expressed concern that an employee whose tasks include contact with the public could deliberately harm the government's (and thereby the dominant party's) image in the public eye; one who must provide information to government officials perhaps could deliberately undermine policy decisions or administrative efficacy. However, any government employee, including those with the most routine clerical tasks, could injure the employer's efficiency or public image. A receptionist could put callers on hold and neglect to answer or forward their inquiries; an office clerk could misfile forms, deliberately delay their processing, and treat visitors rudely. The obvious response is that employees who engage in such behavior can be discharged on the basis of their poor job performance. The potential that an employee may cause havoc is in itself no basis for holding the employee can be hired or discharged because of his or her political affiliation.

Id. at 639.

In the present case, the District Court found, at the close of discovery, that there were no remaining material issues of fact as to whether political affiliation was an appropriate requirement for Armour's position. As we explain in the paragraphs which follow, our review of the record

yields a different conclusion.

We highlight certain factual disputes that we find unsusceptible to resolution at the summary judgment stage. First, we note that the District Court undertook to weigh the credibility and relative significance of Armour's March 11, 1998 written comments about her job description and her subsequent deposition testimony on the subject. Specifically, the District Court characterized Armour's deposition testimony as "contradictory and her unbiased statement regarding her job duties as provided in March 1998 as more significant." We think such weighing should have been reserved for the fact-finder.[5]

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[5] The District Court relied on *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3d Cir. 1988) as support for its authority to assess the credibility of the later deposition testimony. We find the District Court's reliance on *Martin* to be misplaced. In *Videon Chevrolet, Inc. v. General Motors Corporation*, 992 F.2d 482 (3d Cir. 1993), we distinguished a situation in which a party gave ambiguous deposition testimony from the situation in *Martin* and emphasized that the *Martin* court had articulated a rule applicable only in extreme circumstances:

> In *Martin*, the mother of a child born with birth defects made eight sworn factual statements tending to negate liability on the part of the defendant drug manufacturer. Later, facing an almost certain loss on summary judgment, she submitted a flatly contradictory affidavit which contained no explanation for her change in position. We held that on those clear and extreme facts the district court could properly ignore the later affidavit.

Videon Chevrolet, Inc., 992 F.2d at 488. *See also Farrell v. Planters Lifesavers Company*, 206 F.3d 271 (3d Cir. 2000).

In the same vein, we do not agree with the District Court that Clarke's testimony that she "represented" Donatella supports summary judgment. The theme of representation was addressed in the testimony of a number of witnesses; however, the content of the testimony on the concept of representation of the commissioners is less than clear. Whereas Clarke testified that she "represented" Donatella at political events, a reasonable fact-finder might conclude that the representation of which she spoke entailed little more than her presence at certain events rather than active participation as a spokesperson ("I go just to represent him, be present"). For her part, Armour testified that it was not part of her job to represent Schulte at political events. Armour's role at the AFPN meetings--she attended in Schulte's stead but Schulte only became aware that Armour voted at the meetings after the fact--might also be interpreted to support more than one inference regarding the level of representation inherent in the position.

Further, Armour contends that the fact that the commissioners created a new administrative position above the secretaries, though they never filled that position, would lend support to a finding that the secretarial positions did not

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Unlike *Martin*, in the present case appellant did provide what a fact-finder might regard as a plausible explanation for the differences between her 1998 written comments about the nature of the secretarial position and her subsequent deposition testimony about the degree of political involvement, confidentiality, and responsibility required ("[T]he concept I was trying to get across was what I thought the job should be more so than what the job actually is."). A fact-finder might not only have accepted the explanation but gone on to credit the deposition testimony of appellant that the District Court declined to give equivalent weight to.

entail the level of confidentiality or require the type of representation of the commissioners that would make political affiliation a proper job requirement. Specifically, Schulte testified that the never-filled executive administrator position required a college degree because the person in that position "would, indeed, be representing the three commissioners." Of course, the fact that the administrative position was created would not *compel* a fact-finder to conclude that the work of the secretaries and the work of the potential administrator would not have overlapped in any respect. However, the creation of the administrative position and the adoption of more demanding requirements for it than for a secretarial position might lead a fact-finder to doubt that a secretarial position was one for which political affiliation was a proper ingredient.

Finally, we note that the secretaries' contact with constituents, relied on by the District Court in its summary judgment ruling, also fails to bear the weight of the government's burden on the appropriateness of a political-affiliation requirement. It is undisputed that Armour and the other secretaries responded to constituent calls and, when possible, handled constituents' requests without involving the commissioners. We are, however, unpersuaded that the fact that the secretaries would attempt to handle constituents' requests on their own ineluctably leads to the conclusion that political affiliation was an appropriate requirement for the job. *See Zold*, 935 F.2d at 638 (employee's contact with the public limited to receiving and responding to inquiries and complaints rather than promoting policies did not support a political-affiliation requirement).

Neither the County nor Schulte contends that this case implicates the central question in most political patronage cases--whether an employee had "meaningful input into decision making." *Brown*, 787 F.2d at 170. Instead, appellees rely on evidence that Armour was entrusted with access to confidential information as part of her job and that a lack of political loyalty would interfere with the performance of her duties. We have, indeed, acknowledged that access to confidential information may support a political-affiliation job requirement even in the absence of a decision-making function. *See Zold*, 935 F.2d at 638-39. However, we have also cautioned against an over reliance on the factors of confidentiality and loyalty: "Although loyalty and confidentiality of sheriff's deputies are desirable attributes, those traits are needed for many working relationships. It has never been suggested that the need for loyalty and confidentiality alone supports politically motivated dismissals independent of the tasks which the employee must perform." *Burns v. County of Cambria*, 971 F.2d 1015, 1023 (3d Cir.), *cert. denied*, 506 U.S. 1081 (1993), 122 L. E. 2d 357, 113 S. Ct. 1049. Here we are faced with the question whether being the personal secretary to a county commissioner is, without more, sufficient evidence to establish as a matter of law that political affiliation is an appropriate job requirement. There is case law that points in this direction. For example, in *Faughender v. City of North Olmsted*, 927 F.2d 909, 914 (6th Cir. 1991), the Sixth Circuit stated: "Viewed in its functional aspect, a mayor's secretary is clearly the type of position that involves access to confidential and political material, and political loyalty, whether partisan or personal, is an essential attribute of the job." But the fact-specific approach embraced by this court in *Brown* and *Zold* and other cases is not in harmony with such a categorical rule.

Armour's "access to confidential information . . . might signify that political affiliation . . . is a job requirement." *Zold*, 935 F.2d at 638. However, on the record before us, we are unable to so conclude without weighing the evidence--a task that we leave for the fact-finder. If a jury were to credit Armour's testimony, and indeed a good deal of the testimony of Donatella and Johnson, it could find that the job duties of the commissioner's secretary were more analogous to "the most routine clerical tasks," *Id.* at 639, than to tasks involving a high level of confidentiality.

Thus, based on our review of the record, we conclude that, under Fed. R. Civ. P. 56(c), genuine disputes regarding the nature of Armour's position remain. This conclusion is strengthened in that, as mentioned above, the "substantial" burden of proving that political affiliation is an appropriate job requirement remains at all times on the governmental entity or official seeking to justify the adverse employment action. *See Burns*, 971 F.2d at 1022.[6]

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[6] Our dissenting colleague observes that "[w]e have previously declared summary judgment appropriate in political dismissal cases, depending, of course, on the facts. *Boyle*, 139 F.3d at 397; *Ness*, 660 F.2d at 522. This is such a case."

Ness is authority for the proposition that "[w]here, as a matter of law, a person is determined to have occupied a policymaking position, that person's claims to protection from patronage dismissal under *Elrod* and *Branti* are disposable on a motion for summary judgment." *Id.* What was said in *Ness* must, of course, be read in the context of the Supreme Court's recital in *Branti* "that party affiliation is not necessarily relevant to every policymaking or confidential position." 445 U.S. at 518. We do not understand the dissent to contend that Armour's position could properly be characterized as "policymaking." On the other hand, there is certainly evidence of record that some of Armour's

B. The *Sua Sponte* Ruling That Armour Was Not Fired for Political Reasons

We turn now to the District Court's alternative basis for granting summary judgment--namely, that Armour failed to come forward with evidence linking her termination to her perceived political affiliation.

In order to prevail on a First Amendment claim of discrimination, a public employee must prove "that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision." *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995). In this case, appellees had submitted a summary judgment motion to the District Court that was directed at the appropriateness of requiring political affiliation in the secretarial position. In that summary judgment motion appellees acknowledged that the issue of whether Armour's firing was politically motivated "involve[s] disputes over issues of material fact best left for trial." Nevertheless, when ruling on the parties' motions, the District Court *sua sponte* addressed the issue of why Armour was fired.

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responsibilities were "confidential." However, the record does not *compel* the inference that, as a matter of law, the totality, or even the bulk, of Armour's responsibilities were "confidential." Accordingly, determining whether the defendants, on whom the burden rests, have been able to establish that Armour's job falls outside the protections of *Elrod* and *Branti* is a matter for the factfinder, not for the District Court on summary judgment. As we noted in *Boyle*, "at the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the factfinder." 139 F.3d at 393.

We need not reach the merits of the District Court's *sua sponte* disposition of the causation issue because the District Court did not, prior to its ruling, notify the parties that the issue would be addressed. Our holding in *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903 (3d Cir. 1994), is controlling. In *Otis Elevator Co.*, "[t]he district court not only denied [defendant's] motion for summary judgment with respect to count IV, it granted summary judgment for [plaintiff] with respect to that count, *sua sponte*." *Id.* at 909. We noted that even though the district court's decision was "understandable given the state of the record," "it nonetheless constituted error under Rule 56 of the Federal Rules of Civil Procedure," and, accordingly, we vacated the order. *Id.* at 910.

Thus, we cannot sustain the District Court's *sua sponte* ruling that appellant failed to adduce facts that would support an inference that she was fired on the basis of her political affiliation.

III Conclusion

Because we conclude that there are material issues of fact for the fact-finder and because the District Court did not provide notice to the parties that it would reach the question of causation on summary judgment, the order of the District Court granting summary judgment in favor of appellees is reversed. The case is remanded to the District Court for further proceedings consistent with this opinion.

DISSENT

SCIRICA, *Circuit Judge, dissenting.*

Throughout most of Pennsylvania's counties, the county commissioners constitute both the executive and the legislative branch of government, "generally regulating the affairs of the county." 16 Pa. Cons. Stat. §509(a) (1955).[1] As such, the commissioners are the chief political and governmental authorities, exercising all the corporate powers of the county. *Id.* §512. With respect to county affairs, commissioners have long been vested with vast discretionary powers. *Kistler v. Carbon County*, 154 Pa. Super. 299, 35 A.2d 733, 739 (Pa. Super. Ct. 1944).

Despite their many governmental duties, Beaver County Commissioners employ only one secretary apiece. Because of the manifold demands placed on County Commissioner Bea Schulte, her secretary, Dolores Armour, performed many tasks requiring confidentiality and high levels of responsibility. With significant political and

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[1] This is true in counties of the Third to Eighth Classes, comprising sixty-two of Pennsylvania's sixty-seven counties. Philadelphia is Pennsylvania's only First Class county, with more than 1,500,000 inhabitants (1,585,577 in the last census). Allegheny is a Second Class county, with a population between 800,000 and 1,500,000 inhabitants (1,336,449). There are three Second Class A counties, with populations ranging from 500,000 to 800,000 inhabitants: Montgomery (678,111), Delaware (547,651), and Bucks (541,174). Beaver is a Fourth Class county, with a population between 150,000 and 225,000 inhabitants (186,093). In counties from the Third to Eighth Classes, excepting home-rule counties, the executive and legislative officers are the county commissioners.

administrative duties, Armour functioned as more than a clerical secretary. Armour was an integral component of the commissioner's office, helping Schulte to serve her constituents effectively.

In *Elrod v. Burns*, the Supreme Court held a political employee who "acts as an advisor or formulates plans for the implementation of broad goals" may be dismissed because of her political beliefs without violating the First Amendment. 427 U.S. 347, 368 (1976), 49 L. Ed. 2d 547, 96 S. Ct. 2673 (Brennan, J., plurality opinion). The Court also noted that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions" and that "[t]he nature of the [employee's] responsibilities is critical." *Id.* at 367. Four years later, in *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980), 63 L. Ed. 2d 574, 100 S. Ct. 1287 the Supreme Court stated the ultimate "question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the performance of the public office involved," taking into account the "vital interest in maintaining governmental effectiveness and efficiency." 445 U.S. 507, 517-18 (1980).

Recent cases have clarified how courts should determine whether the dismissal of political-patronage employees, like Dolores Armour, pass constitutional muster. This "functional analysis" may turn, for example, on whether a difference in political affiliation between employer and employee will be "highly likely to cause an official to be ineffective in carrying out" the official's duties. *Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981) (finding city solicitors' party affiliations relevant to the performance of their responsibilities). If so, the employee's dismissal does not

violate the First Amendment.[2] Of course, as the District Court here observed, "the constitutional limitations on political patronage extend to intraparty political disputes as well as interparty political disputes." Opinion at 3 (citing *Robertson v. Fiore*, 62 F.3d 596, 601-02 (3d Cir. 1995)).

As the majority acknowledges, "access to confidential information may support a political-affiliation job requirement even in the absence of a decision-making function." *Supra* at 25 (citing *Zold v. Township of Mantua*, 935 F.2d 633, 638-39 (3d Cir. 1991)). Given the sensitive correspondence, resolutions, telephone messages, and partisan material arriving in the commissioner's office each day, Commissioner Schulte needed a loyal lieutenant. If Armour's political loyalties diverged from her employer's, it would appear that she should not be constitutionally protected against dismissal from her confidential post.

The majority properly refuses to "overrel[y]" on Armour's access to confidential information. But the testimony unmistakably demonstrated more than Armour's access to confidential information. It also proved that Armour performed administrative and political tasks requiring discretion and judgment. Armour served as Schulte's private secretary and administrative assistant from January 1996

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[2] *See, e.g., Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 396 (3d Cir. 1998); *Wetzel v. Tucker*, 139 F.3d 380, 384 (3d Cir. 1998); *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993). A similar test was employed by the Court of Appeals for the Sixth Circuit in a case the majority cites for support of a "categorical rule," *Faughender v. City of North Olmsted*, 927 F.2d 909, 914 (6th Cir. 1991). *Faughender* was also an appeal from summary judgment.

through February 1999. During that period, she attended meetings of the Aliquippa Family Preservation Network on Schulte's behalf, sometimes voting her proxy. Whenever possible, Armour answered constituents' requests herself. Armour also attended political functions and fundraisers with Schulte, testifying these events were designed "to get [Schulte's] name out." Furthermore, Armour acted as the liaison between Schulte and department heads. Admitting that her duties required political acumen, Armour testified "[t]he high level of confidentiality and responsibility reaches far beyond the desk, often into our personal lives." Armour also conceded that political affiliation was an appropriate requirement for her position and that she would never have been hired had she not actively supported Schulte's 1996 successful campaign for office.[3] As the District Court noted:

> Each time [Armour] responded to a concern of a constituent, she was representing Schulte in a political nature. It is likely that Democratic constituents who seek redress from their Democratic commissioner, or simply express concerns of a political nature, expect that the commissioner's secretary shares their political ideology. In other words, Democratic

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[3] Armour became involved in Schulte's campaign for county commissioner when Schulte's husband, a Pennsylvania district justice, asked Armour to assist his wife. Armour testified she did "[w]hatever was asked" in the campaign, including attending organizational meetings and functions, driving Schulte to the polling places, and posting Schulte's signs throughout the county. After Schulte's election, the commissioner-elect asked Armour to serve as her secretary, which Armour immediately accepted. Armour began working the day Schulte took her oath of office.

> constituents should find comfort in expressing their concerns to the commissioner's secretary, whom the voters felt would express or relay the issues accurately and compassionately to the commissioner.

Opinion at 11-12.

In addition to this evidence, the District Court considered testimony from others regarding the role of commissioners' secretaries. Beaver County Commissioner Dan Donatella declared his secretary "operates as his eyes and ears, both politically and otherwise." Jo Johnson, secretary to Beaver County Commissioner Nancy Loxley, testified her position required political loyalty because Loxley discussed in confidence political as well as party issues. Both Johnson and Joan Clarke, secretary to Commissioner Donatella, described their jobs as "political." Clarke testified that she represented Commissioner Donatella "when I am anywhere politically."

In light of their duties, the Beaver County Commissioners' secretaries functioned as political and governmental assistants. *Cf. Branti*, 445 U.S. at 517. Other Courts of Appeals have repeatedly concluded policymakers' assistants' jobs are not protected by the First Amendment.[4]

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[4] *E.g.*, *Baker v. Hadley*, 167 F.3d 1014, 1019 (6th Cir. 1999) (upholding dismissal of employees in county auditor's office where the auditor intended the positions to be "confidential, policymaking jobs for which political affiliation was an appropriate requirement"); *Soderstrum v. Town of Grand Isle*, 925 F.2d 135, 140-41 (5th Cir. 1991) (finding a police chief's secretary was a "confidential employee," based in part on a "realistic understanding of the confidential relationship between secretaries and their bosses"); *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988) (noting

The District Court correctly reached the same result in this case.

Armour's duties were constitutionally indistinguishable from those of a mayor's secretary. As the Court of Appeals for the Sixth Circuit held, "Viewed in its functional aspect, a mayor's secretary is clearly the type of position that involves access to confidential and political material, and political loyalty . . . is an essential attribute of the job." *Faughender,* 927 F.2d at 914. It is difficult to imagine that the Mayor of Philadelphia or Pittsburgh, or the President of their City Councils, would be unable to employ a secretary who was not politically loyal.[5] County commissioners in Fourth Class counties, representing the executive and legislative branches of government, must have at least as much right as mayors to employ secretaries who further the commissioners' political and governmental agendas.

Nevertheless, the majority finds summary judgment inappropriate because of conflicting evidence whether a commissioner's secretary is "clerical" in nature. *Supra* at 25.

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political affiliation is "an appropriate requirement when there is a rational connection between shared ideology and job performance"); *Santiago-Correa v. Hernandez-Colon*, 835 F.2d 395, 397 (1st Cir. 1987) (observing political officials may fire "'confidential' employees, like personal secretaries" because of "political affiliation").

[5] As noted in *Faughender*, "A mayor's secretary must undertake those functions in relation to the flow of information, whether by writing, speech, or personal visit, to and from the mayor's office, that the mayor wants the secretary to perform. A particular secretary's duties may be circumscribed, but the function of the office is constant." 927 F.2d at 913-14.

As we noted in *Zold*, "When the issue on appeal turns on a constitutional fact . . . appellate courts have the obligation to give such facts special scrutiny. . . . An appellate court in such instances may draw its own inference from facts in the record." 935 F.2d at 636. I see no outstanding issues that require factual resolution. That the District Court must apply a functional, case-specific test does not render summary judgment inapplicable. We have previously declared summary judgment appropriate in political-dismissal cases, depending, of course, on the facts. *Boyle,* 139 F.3d at 397; *Ness*, 660 F.2d at 522. This is such a case.

Applying the same test as the District Court, I find no "genuine issue of material fact," FED. R. CIV. P. 56(c), after affording the non-moving party all "reasonable inferences," *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). Nor do I find "reasonable" an inference that Armour's duties were primarily clerical. An officeholder's "clerical" employees do not vote her proxies, resolve constituents' requests, or have access to the office's most sensitive and confidential political and governmental information, as did Armour. The District Court held, "In essence, plaintiff was a conduit between the Democratic constituents and Commissioner Schulte, their elected representative." Opinion at 12.

The majority frames the issue as whether summary judgment was appropriate, given Armour was a "nonpolicymaking, secretary-clerk serving in roughly equal parts an elective county executive (County Commissioner) and a non-elective county administrator (Chief Clerk)." *Supra* at 19. I do not read the court's opinion as an attempt to segregate Armour's duties between the "political" and the

"nonpolitical." Of course, were that the standard, "political" employees in state or municipal government would be virtually nonexistent. Necessity demands the staffs of elected officials perform several tasks -- governmental, political, administrative, and clerical. Clerical duties, even if they are "roughly equal" to more specialized obligations, do not render those employees "nonpolitical."

The District Court found that an "absence of political cohesion" between Armour and Schulte would potentially damage the commissioner's work, rendering Armour an employee subject to dismissal on political grounds. Opinion at 12, quoted *supra* at 14-16. Having reviewed the record, I would agree.[6]

Because I would affirm the judgment of the District Court, I respectfully dissent.

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[6] I would also affirm the District Court's alternative holding -- that Armour did not demonstrate her support of Joseph Askar for a local judgeship was a "substantial or motivating factor" in her termination. Opinion at 12-14. The evidence demonstrated Schulte only questioned Armour once about her involvement with Askar, and Armour denied any "direct" involvement with Askar's campaign. With no other evidentiary support, Armour did not meet her burden of proving that her political affiliations led to her dismissal.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-669

[Dated March 30, 2000]

DELORES ARMOUR,)
Plaintiff,)
)
v.)
)
THE COUNTY OF BEAVER,)
PENNSYLVANIA, and BEA SCHULTE,)
Commissioner, in her individual capacity.)
Defendants.)
)

OPINION

ZIEGLER, Chief Judge. Pending before the court is the motion (doc. no. 10) of defendants, the County of Beaver, Pennsylvania and Bea Schulte, Commissioner, for summary judgment pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure. Plaintiff, Delores Armour, contends that she was terminated from her employment by defendants in violation of her First and Fourteenth Amendment rights and 42 U.S.C. §1983. Jurisdiction is based on 28 U.S.C. §§1331 and 1343(a) (3) and (4). For the reasons that follow,

defendants motion for summary judgment will be granted.

I. FACTS

Delores Armour became involved in the 1996 campaign of Bea Schulte, who was running for Commissioner of Beaver County, Pennsylvania. Plaintiff attended committee meetings with Schulte, traveled to polling locations, went to political functions to promote her candidacy, attended fund-raising events, and placed Schulte's signs throughout the voting district. After Schulte was elected Commissioner, but prior to assuming her official duties, Schulte offered plaintiff a position as Schulte's secretary. Plaintiff accepted the offer and began in January 1996.

Plaintiff contends that on or about February 1, 1999, Schulte learned that plaintiff intended to support Joseph Askar, a Democratic candidate for district justice, who was running against Joseph Zupsic, the Democratic candidate whom Schulte allegedly supported. Plaintiff asserts that Schulte terminated her from employment on February 26, 1999, because of her political affiliation and her perceived support of Askar, in violation of her First and Fourteenth Amendment rights and 42 U.S.C. §1983.

II. DISCUSSION

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, we must examine the evidence in light most favorable to the non-moving party and draw all

reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The moving party bears the initial burden of identifying the basis of the motion and the evidence which demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Then, the non-moving party must produce evidence such that a reasonable fact-finder could find for said party in order to avoid summary judgment. *Anderson*, 477 U.S. at 248-49. When considering the reasonable fact-finder rule, the court must apply the evidentiary standard which governs at trial. *Anderson*, 477 U.S. at 252.

Initially, we note that plaintiff, Bea Schulte, Joseph Askar, and Joseph Zupsic are Democrats. Nevertheless, the constitutional limitations on political patronage extend to intraparty political disputes as well as interparty political disputes. *Robertson v. Fiore*, 62 F.3d 596, 601 (3d Cir. 1995); *see also Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985)(employee's political beliefs are not diminished because a superior supports a different faction within a party as opposed to a different party altogether).

In *Elrod v. Burns*, 427 .U.S. 347 (1976), the Supreme Court held that termination of a government employee solely because of his/her political affiliation violates the First and Fourteenth Amendments. *Elrod*, 427 U.S. at 373. However, the Court recognized an exception which permits patronage dismissals for an employee who "acts as an advisor or formulates plans for the implementation of broad goals." *Elrod*, 427 U.S. at 368. This exception is considered to encompass employees in policymaking or confidential positions. *See Brown v. Trench*, 787 F.2d 167, 168 (3d Cir. 1986). The Court also noted that it is not always easy to

determine whether a position is one for which political affiliation is an appropriate factor when evaluating an alleged patronage dismissal. *Elrod*, 427 U.S. at 367.

The Supreme Court revisited the political patronage dismissal issue in *Branti v. Finkel*, 445 U.S. 507 (1980), and held that the ultimate inquiry is not to determine whether a position is "policymaking" or "confidential;" rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Branti*, 445 U.S. at 518. The Court reiterated that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the state's vital interest in maintaining governmental effectiveness and efficiency." *Boyle v. County of Allegheny, Pennsylvania*, 139 F.3d 386, 395 (3d Cir. 1998)(quoting *Branti*, 445 U.S. at 517); *Elrod*, 427 U.S. at 366.

In *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981), the Court of Appeals adopted the *Elrod/Branti* test and held that, should a difference in party affiliation be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office, dismissals for that reason would not offend the First Amendment. *Ness*, 660 F.2d at 521. The Court held that city and assistant city solicitors were positions for which party affiliation is an appropriate requirement for the effective performance of the job. *Ness*, 660 F.2d at 522-23. In *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986), the Court held that the relevant inquiry is the function of the public office at issue and not the actual past duties of the particular employee involved. *Brown*, 787 F.2d at 168-69. Further, each determination of whether political

affiliation is an appropriate requirement for the effective performance of a particular position is fact-specific to each case. *Zold v. Township of Mantua*, 935 F.2d.633, 635 (3d Cir. 1991). In *Zold*, the Court recognized a greater flexibility on the part of lower courts to determine each case under the facts and context, due to the lack of explicit guidance concerning factors to be used for the patronage dismissal analysis. *Zold*, 935 F.2d at 396.

To establish a claim of discrimination based on political association, plaintiff, as a public employee must prove that: (1) she works for a public agency in a position that does not require a political affiliation,[1] (2) she maintained an affiliation with a political party, and (3) her political affiliation was a substantial or motivating factor in the adverse employment decision. *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995) (citing *Laskaris v. Thornburgh*, 733 F.2d 260, 265 (3d Cir. 1984)). If plaintiff satisfies these elements, the employer may avoid liability by proving by a preponderance of the evidence that it would have made the same decision even in the absence of the protected affiliation. *Robertson*, 62 F.3d at 599, citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Laskaris*, 733 F.2d at 264.

The parties do not dispute that plaintiff was employed as Schulte's secretary from January 1996 through the date of

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[1] Although the employee must prove employment by a public entity, the employer has the burden of proving that the position is one for which political affiliation is an appropriate requirement. *Branti*, 445 U.S. at 518; *Robertson*, 62 F.3d at 599 n.2.

her discharge in February 1999. As Schulte occupied the office of Commissioner of Beaver County, Pennsylvania, we find that plaintiff has established employment with a public agency. We now turn to whether plaintiff's position is one for which political affiliation is an appropriate requirement for the effective performance of her job. As noted, defendants have the burden of proof. *See Branti*, 445 U.S. at 518.

The determination whether a position is one for which political affiliation is an appropriate requirement, for the effective performance of the job depends on the particular facts of each case. *See Zold*, 935 F.2d at 635; *Boyle*, 139 F.3d at 397, citing *Furlong v. Gudknecht*, 808 F.2d 233, 235 (3d Cir. 1986). Plaintiff's involvement with Schulte's campaign included attending political functions with Schulte, as well as committee meetings wherein political strategy was discussed. Schulte Dep. at 17. After the election, Schulte appointed plaintiff as her secretary. Schulte Dep. at 18. Beyond the typical secretarial duties, plaintiff was privy to extended lists of resolutions and motions from each commissioners' meeting and the resulting correspondence among commissioners. Schulte Dep. at 19-20. Plaintiff answered all of Schulte's telephone calls, set her personal calendar, and handled confidential material for Schulte. Schulte Dep. at 20. In addition, plaintiff acted as liaison between Schulte and department heads with respect to scheduling meetings and their purpose. Schulte Dep. at 21. Schulte described this interaction as:

> a very important part of her function. If she did [not] understand the purpose of the meeting, then she could [not] explain it, and

> often the meetings [involved] confidential matters.

Schulte Dep. at 21-22. Moreover, Schulte testified that political affiliation is in fact an appropriate job requirement for plaintiff's position. Schulte Dep. at 22.

Dan Donatella, also a Beaver County Commissioner, testified with regard to the position of secretary to a commissioner:

> [t]he secretary obviously in that capacity works very close with the county commissioner whom she's affiliated with because of the fact that you need a good close relationship. As a matter of fact, I do believe that they were classified as confidential secretaries and not come under the realm of the union, because each commissioner was at liberty to select that particular employee because of the relationship that they needed to maintain.

Donatella Dep. at 6. Further, Donatella stated that his secretary "operates as his eyes and ears, both politically and otherwise." *Id.* In response to the question whether political affiliation is required, he stated:

> [w]ell, I don't know if it [is] a requirement, no; but mainly, it is associated with that because on the campaign trail, usually those people are directly or indirectly involved in the

> campaign, helping that individual to be elected.

Donatella Dep. at 9. Plaintiff relies on this statement as evidence that political affiliation is not required for the position at issue. Pl.'s Br. at 7-8. We disagree with the plaintiff, however, because Donatella went on to explain:

> [i]t [is] whomever that commissioner feels comfortable with I think is the bottom line. They have to be capable of doing the job at hand, and it always helps to be politically astute, obviously . . . Well, generally, if a Republican is a commissioner, they are going to hire a Republican secretary and the other way around. I do [not] know of any case where it was other than that. I do [not] remember a Democrat hiring a Republican or vice versa, at least to my knowledge in the 35 years I was there. They are generally the same party . . .

Donatella Dep at 9-10. Furthermore, Donatella commented that, with respect to the relationship between Schulte and plaintiff immediately prior to her discharge, plaintiff was "[Schulte's] employee and I had no right, frankly to tell her anything because it was none of my business." Donatella Dep. at 18.

Jo Johnson, secretary to Commissioner Loxley, also provided testimony with respect to the duties of the position at issue. Johnson explained a portion of the duties as such:

> [w]e also work with elected officials and the general public who approach this office with questions and concerns to try and assist with those questions and provide answers and solutions, sometimes before actually going to the commissioner itself, which is we just try and solve the problem before we would have to approach the commissioner with it.

Johnson Dep. at 6. Johnson also stated that she considers the position of secretary to Commissioner Loxley as a confidential position, the office has a political atmosphere, and that Ms. Loxley talks to her in confidence about political issues as well as party issues, which she must keep confidential. Johnson Dep. at 35-36. In addition, she stated that, if she were not loyal to Ms. Loxley, she would not expect to keep her job. Johnson Dep. at 37. Finally, Johnson stated that "this certainly is a political position." *Id.* Johnson also provided an affidavit wherein she declared that she heard plaintiff describe her position several times as "confidential secretary to Bea Schulte." Johnson Aff.

Joann Clarke, secretary to Commissioner Donatella, also provided evidence with respect to the position of secretary to a county commissioner. Clarke described her responsibility as "to represent [Commissioner Donatella] and to keep all confidentiality." Clarke Dep. at 9. Further, she explained, "I represent Commissioner Donatella mainly when I am anywhere politically." Clarke Dep. at 34.

Finally, we address plaintiff's own statements regarding her position as secretary to Commissioner Schulte. Plaintiff opened mail that was addressed to Schulte and

"gleaned" through its content to determine whether it concerned the entire board of commissioners or concerned a personal matter of Schulte. Armour Dep. at 41. When answering calls from constituents, plaintiff admits that it was her responsibility to address the issue raised by the caller without involving Schulte, whenever possible. Armour Dep. at 46-47. Further, plaintiff attended monthly meetings of the Aluquippa Family Preservation Network for Schulte and described her role as a "proxy for Commissioner Schulte." Armour Dep. at 47. She voted on behalf of Schulte, took notes and reported the details of the meeting to Schulte. *Id.* Plaintiff also attended political functions and fund raisers with Schulte, and admits that these events were designed to "get [Schulte's] name out." Armour Dep. at 50-51. Moreover, plaintiff admits that she would not have been hired as Schulte's secretary if she had supported another candidate in the 1996 election. Armour Dep. at 70.

Plaintiff testified in her deposition that she considered her position one which required a "normal degree" of confidentiality. Armour Dep. at 49. Moreover, she denied that she viewed her position as more of an administrative assistant. *Id.* However, plaintiff completed a job description on March 11, 1998, describing her duties as follows:

> [a]lthough this job may appear secretarial in nature, a large portion of the duties fall more towards administrative assistant. The high level of confidentiality and responsibility reaches far beyond the desk, often into our personal lives. A broad background in [c]ounty government is essential for even the entry level of this position.

Armour Dep. Ex. 1. Plaintiff completed this job description before any alleged problems between herself and Schulte. We thus consider her deposition testimony as contradictory and her unbiased statement regarding her job duties as provided in March 1998 as more significant. *See, e.g., Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705-06 (3d Cir. 1988) (permissible for district court to disregard subsequent contradictory affidavit for purposes of determining whether there was a material dispute of fact).

We find that plaintiff's party affiliation was an appropriate requirement for the effective performance of the job. *See Ness*, 660 F.2d at 521; *Brown*,787 F.2d at 170; *Waskovich v. Morgano*, 2 F.3d 1292, 1303 (3d Cir. 1993); *Roseman v. County of Cambria*, 861 F. Supp. 19, 21 (W.D.Pa. 1993); *see also Williams v. City of River Rouge*, 909 F.2d 151, 153 n.4 (6th Cir. 1990) (political affiliation is more than party politics, it is about trust, confidence, and sharing a common viewpoint with those to whom authority is delegated). Plaintiff acted as liaison between department heads and Schulte, which required knowledge of confidential matters. She also had access to correspondence containing party issues and confidential material. Commissioner Donatella noted the importance of loyalty and the necessity of a close relationship between the commissioner and secretary. Johnson described the office as a political atmosphere, and Clark acknowledged that she "represents" Commissioner Donatella at political events.

Plaintiff testified that she responded to constituent calls and handled the matter before involving Schulte. Each time plaintiff responded to a concern of a constituent, she was representing Schulte in a political nature. *See, e.g., Brown*,

787 F.2d at 170 (while some of [plaintiff's] duties were only technical or clerical in nature, her principal duty was to act as spokesman for the Commissioners). It is likely that Democratic constituents who seek redress from their Democratic commissioner, or simply express concerns of a political nature, expect that the commissioner's secretary shares their political ideology. In other words, Democratic constituents should find comfort in expressing their concerns to the commissioner's secretary, whom the voters felt would express or relay the issues accurately and compassionately to the commissioner. In essence, plaintiff was a conduit between the Democratic constituents and Commissioner Schulte, their elected representative. *See Waskovich*, 2 F.3d at 1299-1300, quoting *Hall v. Ford*, 856 F.2d 255 263 (D.C.Cir. 1988) ("high level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their superiors' policies, and perceived by the public as sharing their superiors' aims").

Plaintiff attended meetings on behalf of Schulte, voted in her stead, and attended political functions with the Commissioner. Her own job description elevated the position to one of "administrative assistant." Based on the evidence of record, we find that an absence of political cohesion would undermine the working relationship between plaintiff and Schulte. *Cf. Burns v. County of Cambria, Pennsylvania*, 971 F.2d 1015, 1022-23 (3d Cir. 1992). We find that defendants have established that political affiliation is an appropriate job requirement for plaintiff's position.

Assuming that plaintiff's position was in fact one for which political affiliation was not necessary for the effective performance of the job, plaintiff still would not prevail in

establishing the remaining parts of the *Robertson* test. For instance, plaintiff must show that she maintained an affiliation with a political party, or in this case, with a particular candidate, Joseph Askar. *See Robertson* 62 F.2d at 599. However, when questioned by Schulte, plaintiff specifically denied any "direct" involvement with Askar's campaign. Armour Dep. at 52-53. She explained that her only involvement consisted of providing the names of people who may assist him, and answering "generic" questions, such as how many signs were necessary to cover an area within the district. Armour Dep. at 53-54. Thus, plaintiff's affiliation with Askar's campaign, if any, was minor.

Finally, plaintiff's argument that her "perceived" political affiliation with Askar's campaign was a substantial or motivating factor in Schulte's decision to terminate her is without merit. *See Robertson*, 62 F.3d at 599. As rehearsed, plaintiff denied any significant involvement with Askar's campaign. Further, plaintiff was questioned by Schulte only once regarding her alleged support of Askar, and after her denial, Schulte did not press the issue. In fact, plaintiff testified that after the discussion had ended, she entered Schulte's office and:

> told Bea that I was concerned that people were wondering about what I did on my personal time. I did not think that was relevant to the office.

Armour Dep. at 55. Schulte said nothing in response to this comment. *Id.* In fact, plaintiff stated that she could not recall whether the subject ever resurfaced. *Id.* Therefore, this one incident is insufficient to satisfy plaintiff's burden that her

"perceived" affiliation was a substantial or motivating cause for her dismissal.

Moreover, there is ample evidence of record that evinces a deteriorating relationship between plaintiff and Schulte. For instance, Commissioner Donatella testified:

> I knew the relationship was deteriorating, and as time went on, it got to the point where it was, I think, pretty intolerable. I can [not] speak for Dee, but it had deteriorated to that extent, yes.

Donatella Dep. at 14. Further, Donatella stated:

> I have talked with Bea personally without Dee being present in order to try to resolve the estranged relationship between the two of them. . . [b]ut I really do think- and I think Dee will agree- that it was just something they could [not] work out.

Donatella Dep. at 17. Donatella also explained that Schulte never told him why she had fired plaintiff and stated only that "well, I had to do it." Donatella Dep. at 18-19. In addition, Donatella denied knowledge of a rumor that the reason for plaintiff's dismissal was because of her alleged involvement with Askar's campaign. *Id.* at 27; *see also* Schulte Dep. at 37-38. In fact, after plaintiff was terminated, Donatella was neither stunned nor surprised, because as he explained, "that's the direction it seemed to be going in." Donatella Dep. at 16.

Schulte's letter of termination to plaintiff also explained the motivation behind her dismissal. It stated, *inter alia:*

> [i]t is simply unacceptable to have a personal secretary who is unwilling to work in the Commissioners' office, or even to discuss the working relationship. It was on this basis that I decided that it would be best to terminate our employment relationship.

Schulte Dep. Ex. 1; *see also* Schulte Dep. at 61. We note that "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick v. Myers*, 461 U.S. 138, 151.-52 (1983). Based on the evidence of record, we find that plaintiff's "perceived" support of Askar was not a substantial or motivating factor in Schulte's decision to terminate her from employment.

Defendants' motion for summary judgment will be granted. An appropriate order will follow.

/s/_____
Donald E. Ziegler
Chief Judge

DATED: March 30, 2000

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-669

[Dated March 30, 2000]

DELORES ARMOUR,	)
Plaintiff,	)
	)
v.	)
	)
THE COUNTY OF BEAVER,	)
PENNSYLVANIA, and BEA SCHULTE,	)
Commissioner, in her individual capacity.	)
Defendants.	)
	)

ORDER

AND NOW, this 30th day of March, 2000, after consideration of the motion (doc. no. 10) of defendants, the County of Beaver, Pennsylvania, and Bea Schulte, Commissioner, for summary judgment pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure, and the written submissions of the parties,

IT IS ORDERED that defendants' motion for summary judgment shall be and hereby is granted.

/s/_____
Donald E. Ziegler
Chief Judge

Supreme Court U.S.
FILED
APR 17 2002
OFFICE OF THE CLERK

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No. 01-1403

In The

Supreme Court of the United States

THE COUNTY OF BEAVER, PENNSYLVANIA
and BEA SCHULTE, COMMISSIONER,
In her individual capacity,

Petitioners,

v.

DELORES ARMOUR,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Question 1.

Whether this Court will consider an issue raised by Petitioners for the first time when seeking panel rehearing or rehearing *en banc* with the Court of Appeals?

Question 2.

Can the First Amendment inquiry into whether a government employer meets its burden of showing political affiliation is an appropriate requirement for the successful performance of the position at issue be decided as a question of law on a motion for summary judgment when material issues of fact exist concerning the nature of the position?

LIST OF PARTIES

Respondent concurs with Petitioner's List of the Parties.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Delores Armour (hereafter "Armour") respectfully requests this Court deny the petition for Writ of *Certiorari*, seeking review of the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case. That opinion is reported at 271 F.3d 417 (3d Cir. 2001).

JURISDICTION

Respondent agrees the Petition for Writ of Certiorari was sought within 90 days of the judgment of the Court of Appeals and therefore is timely pursuant to 28 U.S.C. §1257 and §2101(c) and this Court's Rule 13(1).

COUNTERSTATEMENT OF THE CASE

This is a First Amendment political affiliation discharge action brought under 42 U.S.C. §1983. Delores Armour, Plaintiff below, Appellant in the Court of Appeals, and Respondent here, alleges she was fired from her position as secretary to Beaver County Pennsylvania Commissioner Bea Schulte because of her political affiliation. Beaver County and Schulte (hereafter "Beaver County" or "Petitioners") were the defendants below, appellees in the Court of Appeals, and Petitioners here.

A. Petitioners Failed to Raise The Issue Raised Here With the District Court.

Petitioners moved for summary judgment, claiming no material issue of fact existed on the duties of Armour's position and therefore they were entitled to judgment as a matter of law because political affiliation is an appropriate requirement for the position of commissioner's secretary.

In the district court, Petitioners did not contend the issue on a summary judgment record was a question of law or fact. Rather, Petitioners argued no factual issues existed concerning the nature of Armour's position and therefore, the district court could decide the issue as a matter of law. See (Brief in Support of Motion for Summary Judgment) [Doc. No. 11] at 2 (arguing standard of review was whether genuine issue of material facts exist); *Id.*, at 9, (given the specific facts of record, the secretarial position occupied by Armour is a confidential position for which political affiliation is a factor), (Reply to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment) [Doc. No. 16] at 9-11 (arguing no factual dispute exists that would preclude summary judgment on issue of whether defendant met its burden).

The district court granted Defendants' motion finding no factual issues existed on the nature of Armour's position and Beaver County *therefore* was entitled to judgment as a matter of law, pursuant to Fed.R.Civ.P. 56(c).

In finding Armour's party affiliation was an appropriate job requirement, the district court relied primarily on three factors: Armour acted as a liaison between

Schulte and department heads, which requires knowledge of confidential matters; Armour responded to constituent calls and handled the matter before involving Schulte; and Armour had access to correspondence containing party issues and confidential material. In accepting each of these facts, the district court disregarded or rejected Armour's testimony or parts of other witnesses' testimony that contradicted those factual assertions. However, neither the district court, nor even Petitioners, dispute that the question on a summary judgment record was whether material issues of fact existed.

B. Petitioners Failed to Raise The Issue Raised Here With the Court of Appeals Panel.

On appeal, Beaver County again failed to argue that the question of whether Armour could be discharged because of her political affiliation was an issue of law or even that factual issues are determined by the court. Rather, Beaver County acknowledged that on appeal from the grant of summary judgment the court "must review the evidence in [a] light most favorable to the non-moving party and determine whether or not there is sufficient evidence *from which a jury reasonably could find liability.*" (Appellee's Brief in *Armour v. The County of Beaver,* No. 00-3431 at pg. 7) (emphasis added); *Id.*, at 13 ("in determining whether political affiliation is a legitimate factor to be considered for a particular job, the inquiry is inherently fact-specific . . . ").

The Third Circuit reversed the district court's grant of summary judgment, holding the district court failed to view the facts in a light most favorable to Armour, as the non-moving party. The court identified several disputed

facts concerning the nature of Armour's position that could lead a reasonable fact finder to determine Beaver County had not met its burden of proving political affiliation was an appropriate requirement for the successful performance of the job.

C. Petitioners Never Raised The Issue Presented Here Until They Sought Panel Rehearing or *En Banc* Rehearing with the Third Circuit.

Not until it petitioned for Panel Rehearing or *En Banc* Rehearing in the Third Circuit, did Beaver County raise the issue it now raises in its Petition for Writ of Certiorari.

D. Factual Issues Below Precluded Summary Judgment.

In 1995, Schulte ran for Beaver County Commissioner. (R. 51).[1] After Schulte won the election, she offered Armour a position as her secretary. (R. 66). Armour, along with the other two commissioners' secretaries, performed "normal secretarial duties." (R. 67). Although each commissioner was entitled to appoint his or her own secretary, the three shared the same office space (R. 83), and operated as a "general pool," with each secretary, depending on availability, performing routine tasks for any one of the commissioners, as well as the Chief Clerk. (R. 44). For example, if Armour was not at her desk another one of the three secretaries would

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[1] References to the record are noted as "(R. ___)."

answer her phone line and vice versa. (R. 44). The secretaries spent fifty to sixty percent of their time working for the chief clerk. (R. 85, 90).

The three secretaries spent the bulk of their time performing such clerical tasks as typing and copying correspondence, resolutions, and motions (R. 67, 44); answering phones (R. 53); greeting and directing visitors to the office (R. 89); handling paperwork (R. 53); opening mail (R. 67); making photocopies (R. 53); making travel arrangements and scheduling meetings (R. 82); filing documents (R. 67); directing checks to the proper departments (R. 53); and obtaining signatures (R. 44).

In addition to these standard duties, one of the Commissioner's secretaries helped the Chief Clerk with financial tasks, such as paying invoices, and was responsible for taking minutes at public board meetings. (R. 82).

Petitioners below pointed to their witness' description of the job duties. Respondent contended there were factual issues concerning the nature of the position, which could not be resolved on a summary judgment record, especially where, as here, the burden of showing a permissible infringement of First Amendment rights rested with the defendant.

In short the factual issue below was whether Armour's position was simply highly clerical support for the Chief Clerk and a County Commissioner, or whether it was more akin to an administrative assistant. The district court found no factual dispute over the nature of the position. The Third Circuit held otherwise.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

PETITIONERS FAILED TO RAISE THE ISSUE WITH THE DISTRICT COURT OR THE COURT OF APPEALS PANEL.

In the district court, Petitioners did not argue the court, pursuant to the responsibilities imposed on it by the Constitution, was required to resolve the disputed issues of fact as to what Armour's position entailed and to determine whether that position was entitled to First Amendment protection. Quite the contrary, Petitioners moved for summary judgment pursuant to Rule 56(c), claiming *no* disputes of material fact existed and they were entitled to judgment as a matter of law.

Before the Third Circuit Armour argued the district court improperly made credibility determinations and resolved issues of fact on a Rule 56(c) motion. Petitioners did not there raise the issue they now petition for review. Petitioners again maintained there were no disputes of material fact and the district court properly entered judgment in their favor as a matter of law.

Petitioners raised the question of whether the inquiry under *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980) is one of fact or law for the first time in their petition to the Third Circuit for rehearing *en banc*. Petitioners raised their argument too late. Petitioners have waived the issue.

This Court consistently has refused to consider issues not raised in the lower courts. *See, e.g., Groupo de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n. 3 (1999) (declining to consider an argument neither raised

nor considered below), *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998), quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."), *Wisconsin v. Mitchell*, 508 U.S. 476, 481 n. 2 (1993) (refusing to reach claims not developed below), *Sisson v. Ruby*, 497 U.S. 358, 359 n. 1 (1990) (declining to consider an argument not raised before the lower courts), *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988) ("This Court usually will decline to consider questions presented in a petition for writ of certiorari that have not been considered by the lower court."), *Solorio v. U.S.*, 483 U.S. 435, 451 n. 18 (1987) (declining to consider an argument not raised in the lower court), *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 114 n. 9 (1986) (refusing to consider a claim not raised below), *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984) (refusing to address issue not raised before the district court or the court of appeals), *Heckler v. Campbell*, 461 U.S. 458, 468 n. 12 (1983) (declining to consider arguments not raised before the court of appeals), *City of Lockhart v. U.S.*, 460 U.S. 125, 133 n. 9 (1983) (declining to review in the first instance an issue not decided by the district court), *Lawn v. U.S.*, 355 U.S. 339, 362 n. 16 (1958) (refusing to review a question not presented to the Court of Appeals).

In *Wills v. Texas*, 511 U.S. 1097 (1994), this Court denied the petition for writ of certiorari for this reason. Justice O'Connor, in her concurring opinion, agreed with the dissent that while the petitioner may have had a very strong claim the petition should have been denied because, "[i]t has been the traditional practice of this Court, however, to decline to review claims raised for the

first time on rehearing in the court below." *Id.* As Justice O'Connor noted, following that practice in that case was appropriate "because we do not have the benefit of a decision analyzing the application of [the law] to the facts of petitioner's case." *Id.*

Wills' reasoning should also be applied to this case. Because Petitioners did not raise their question before the district court or the panel of the Third Circuit, this Court does not have the benefit of any opinion on whether a jury must decide if Armour's position entitled her to First Amendment protection or whether the issue is one of law for the court to determine. The district court granted Petitioners' summary judgment motion, finding there were no facts in dispute. The Third Circuit reversed, holding disputed facts must be resolved by the fact-finder before the question of whether Armour was entitled to protection under *Elrod-Branti* could be addressed. The issue before both lower courts was whether material facts were in dispute, not whether the *Elrod-Branti* inquiry is for the judge or jury. Thus, this Court does not have the benefit of any lower court decision on the issue Petitioners now raise.

In her concurring opinion in *Wills*, Justice O'Connor relied upon *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). In that case, the petitioners first raised their claim that the Nebraska Supreme Court lacked jurisdiction in motions to dismiss and for rehearing. This Court refused to entertain the question, stating "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration here." *Id., citing Simmerman v. Nebraska*, 116 U.S. 54 (1885), *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932).

Although *Radio Station WOW* and the cases upon which it relied involve review of state court decisions rather than those of federal circuit courts, the reasoning applies equally in the latter context. Because neither of the lower courts were faced with the question Petitioners seek to raise before this Court, this Court, were it to grant the petition for certiorari, would not be reviewing any claimed error of a lower court, but would be deciding the issue in the first instance. That is not the function of this Court. Petitioners raised their question too late for consideration by this Court.

Likewise, this Court has held it will not hear arguments raised for the first time on a petition for rehearing in the court below. In *Hoover v. Ronwin*, 466 U.S. 558 (1984), the respondent claimed before this Court that Arizona's practice of limiting bar admissions violated the Fifth and Fourteenth Amendments. *Id.* at 574 n. 25. This Court refused to address the issue, made for the first time in response to the petitioner's motion for rehearing *en banc* before the Ninth Circuit. Raising the question for the first time in petitioning for *en banc* review is a "failure to [do so] in a timely manner [and] precludes [this Court's] consideration." *Id.*

Similarly, in *Air France v. Saks*, 470 U.S. 392 (1985), this Court was presented with an issue not raised before the circuit court. This Court refused to consider the issue, stating "[w]e leave the disposition of this claim to the Court of Appeals in the first instance." *Id.* at 408, citing *Hoover, supra.*

Again, Petitioners raised the question of which they now seek review for the first time in their petition for rehearing *en banc*. It was not raised or decided by the

district court or the Third Circuit panel. This Court should decline to consider this question in the first instance. Petitioners' failure to raise this argument precludes this Court's consideration of the issue.

Because this Court consistently has refused to decide in the first instance questions that were not raised or decided in the lower courts, the Petition for Writ of Certiorari should be denied.

II.

BECAUSE THE THIRD CIRCUIT REVIEWED A SUMMARY JUDGMENT DECISION, PETITIONERS' PROPOSED QUESTION WOULD NOT PROPERLY HAVE BEEN BEFORE THAT COURT EVEN IF PETITIONERS DID RAISE IT.

In the district court, Petitioners moved for summary judgment, arguing, as any party making a Rule 56(c) motion must do, that there were no material issues of fact in dispute and they were entitled to judgment as a matter of law. The district court agreed and granted Petitioners' motion. Armour appealed this decision to the Third Circuit Court of Appeals, arguing, *inter alia*, that the district court erroneously applied the summary judgment standard by making credibility determinations and resolving factual issues. The Third Circuit agreed with Armour, holding that "there are material issues of fact for the fact-finder," and remanded the case to the district court. What is readily apparent from this synopsis is that the issue of whether the *Elrod-Branti* determination is one of law or an issue of fact for the fact-finder was never before the Third Circuit. Nor did that court even *sua sponte* decide the issue. All the Third Circuit determined was that there

were material facts in dispute rendering summary judgment inappropriate at this stage of the case. The Third Circuit held only that the district court misapplied the standard for summary judgment.

Therefore, this case, at the district court level and before the Third Circuit, solely concerned the standard a district court must apply in deciding a motion for summary judgment pursuant to Rule 56(c), specifically whether such a motion may be granted if there are material facts in dispute and whether a trial court may make credibility determinations in ruling on a Rule 56(c) motion. From both the text of the Rule and the decisions of this Court, it is apparent that one cannot.

Rule 56(c) provides that a motion of summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court clarified what Rule 56(c) requires. There, this Court explained that a factual dispute is "genuine" if the evidence is such that a reasonable fact-finder could return a verdict for the nonmoving party. *Id.* at 248. A fact is "material" if it might affect the outcome of the case. *Id.* A motion for summary judgment must be denied if "sufficient evidence supporting the claimed factual dispute [is] shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 249, *quoting First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). If there is a genuine issue of material fact, summary judgment must be denied; the trial judge is

not permitted to make credibility determinations or resolve the dispute: "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id. See also, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000).

Rather than diverging from this Court's precedent, as Petitioners suggest, the Third Circuit strictly obeyed it. Because it found that the record showed genuine issues of material fact, and that the trial court improperly weighed the evidence and made credibility determinations, the Third Circuit reversed the trial court's grant of summary judgment.

Petitioners do not claim the Third Circuit erred in finding there are issues of material fact in dispute. Nor do they complain that the Third Circuit improperly found the dispute is genuine. Nor do they argue that, contrary to the Third Circuit's holding, the trial court refrained from weighing the evidence. In their question presented, Petitioners do not ask this Court to review any decision the Third Circuit actually made.

Petitioners ask this Court to review whether the *Elrod-Branti* inquiry is a question of law for the court or a question of fact for the jury. Petitioners totally ignore the procedural posture of this case. Regardless of who decides that ultimate issue, that determination cannot be made pursuant to a Rule 56(c) motion if there are material factual disputes about what the government position entailed. That is what the Third Circuit held. Petitioners have not challenged that holding.

The Third Circuit's decision was based on the requirements of Rule 56(c), not on any alleged Third Circuit precedent that the determination of whether political affiliation is an appropriate requirement for a position is a question of fact for the jury. That issue was simply not before that court.

The Third Circuit merely held that genuine issues of material fact precluded an entry of judgment pursuant to Rule 56(c). After these disputes are resolved by the finder of fact, be it the jury or the judge, then and only then will a court be faced with Petitioners' question. This case is simply not ripe for Petitioners' question to be answered. As such, the Petition for Writ of Certiorari should be denied.

III.

NO ACTUAL CONFLICT EXISTS AMONG THE CIRCUIT COURTS ON THE ISSUE DECIDED BY THE THIRD CIRCUIT.

Although they waived the argument by never putting it before either the district court or the Third Circuit panel, Petitioners expound at great length about First Amendment law in general, and a fabricated split among the circuit courts over whether the *Elrod-Branti* inquiry is one of fact or law. However, no actual conflict exists in the procedural posture of this case.

To demonstrate their supposed split among the circuits, Petitioners point to cases where the courts upheld grants of summary judgment in *Elrod-Branti* factual situations because no factual dispute existed. They cite others where the courts held summary judgment was improper because factual issues existed over the nature of the jobs

at issue. In yet others, no summary judgment issue was even before the court.

Petitioners have simply overlooked why these various courts held summary judgment was or was not appropriate in *Elrod-Branti* cases. It has nothing at all to do with the fact that they are *Elrod-Branti* cases, and everything to do with the requirements of Rule 56(c). At bottom, the cases Petitioners cite support a single, and rather unremarkable, proposition: when no genuine issue of material fact exists, summary judgment may be granted; when there are material facts in dispute, summary judgment may not be granted. This is true for all summary judgment motions, regardless of the substantive law that applies to the case.

In short, no split actually exists. Petitioners have not pointed to a single case in which the circuit court found there was no genuine issue of material fact but yet refused to decide the matter as a matter of law. Nor have petitioners cited any cases in which the court found there was a genuine issue of material fact but granted summary judgment anyway.

A. Petitioners Have Not Cited Any First Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners cite *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (P. 18),[2] for the proposition that the First Circuit maintains that the *Elrod-Branti* question is one of law. In that case the First Circuit, *en banc*,

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[2] References to Petitioners' Petition for Writ of Certiorari noted as "(P. ___)."

was reviewing the issuance of a preliminary injunction. In the context of a preliminary injunction hearing, the court is required to weigh the evidence to determine the likelihood of success on the merits. This court's function in this context is totally unlike its function when deciding a Rule 56(c) motion, where the court is prohibited from weighing the evidence. *Jimenez Fuentes* is completely irrelevant to the case at hand.

In *McGurrin Ehrhard v. Connolly*, 867 F.2d 92 (1st Cir. 1989), the district court, after the plaintiff had the opportunity to present her evidence at trial, entered a directed verdict in favor of the defendant. On appeal, the plaintiff argued that her actual duties involved limited decision-making. In response, the First Circuit stated, "[w]e agree that a jury might find that her 'particular responsibilities' as director of SOS West did not involve final policymaking authority. They did, however, involve 'input' into hiring decisions, supervision of employees, and development of office policies and practices." *Id.* at 95.

The First Circuit, based on the undisputed facts of the powers of the position, affirmed the trial court, finding the position was one for which political affiliation was an appropriate requirement. This decision hinged on the First Circuit's view that the inherent powers of a position, rather than the actual function performed, determine the *Elrod-Branti* question.

In *Ortix-Pinero v. Rivera-Arroyo*, 84 F.3d 7 (1st Cir. 1996), the district court granted the defendants' motion for summary judgment. On appeal, the First Circuit noted that no factual dispute sufficient to thwart summary judgment can be created by "conclusory allegations, improbable inferences, and unsupported speculation." *Id.*

at 10 (citation omitted). The plaintiff attempted to do just that, arguing merely that the position was not a "political" position based on the duties he actually performed. *Id.* at 17. The First Circuit, following precedent that the inherent powers of a position, rather than the actual duties performed by the employee, were relevant for the *Elrod-Branti* question, affirmed the district court because there was no genuine issue of material fact with regard to the inherent powers of the position. *Id.* Again, *Ortix-Pinero* is readily distinguishable from the instant case.

Petitioners have not pointed to any First Circuit precedent that would have mandated a decision different from the Third Circuit's decision in this case. *Jimenez Fuentes* involved a hearing for a preliminary injunction; *McGurrin Ehrhard* was decided on a motion for a directed verdict after the plaintiff had the opportunity to present her evidence at trial; and *Ortix-Pinero* was decided on summary judgment when the inherent powers of the position were undisputed. None of these mirror the posture of the instant case.

B. Petitioners Have Not Cited Any Second Circuit Cases In Which The Court Resolved Factual Issues For A Rule 56(c) Motion.

Petitioners cite several Second Circuit cases they claim demonstrate that circuit's acknowledgment of a difference between a fact-specific inquiry and a question of fact. (P. 18). In *Gordon v. County of Rockland*, 110 F.3d 886 (2nd Cir. 1997), the trial court sent to the jury the question whether the plaintiffs were terminated in violation of the Constitution. The Second Circuit reversed, finding as a matter of law that the plaintiffs' positions

were not protected by *Elrod-Branti*. As in *McGurrin Ehrhard, supra*, this decision was rendered after the plaintiffs had the opportunity to present their evidence at trial, not on a Rule 56(c) motion.

In *Vezzetti v. Pellegrini*, 22 F.3d 483 (2nd Cir. 1994), the district court entered summary judgment against two of the plaintiffs, Vezzetti and Stuart, and denied summary judgment against a third plaintiff Griffith, whose case proceeded to trial and resulted in a defense verdict. The first two plaintiffs appealed. The Second Circuit, based on undisputed facts, affirmed the judgment against *Vezzetti*, finding as a matter of law that he held a job for which political affiliation was a valid consideration. *Id.* at 486. The court reversed as to Stuart because the defendants conceded he did not hold a policymaking position and there were disputed facts regarding whether Stuart's termination was motivated by politics. *Id.* Thus, there were three different results for the three plaintiffs: based on undisputed facts, the court ruled as a matter of law under Rule 56(c) as to *Vezzetti*; based on an admission that Stuart was not a policymaking employee and a factual dispute regarding causation, the summary judgment grant was reversed as to Stuart; and, although not before the Second Circuit, Griffith was allowed to proceed to trial on his *Elrod-Branti* claim. What *Vezzetti* demonstrates is the unremarkable proposition that summary judgment is appropriate in an *Elrod-Branti* case when there is no factual dispute or an admission that the position is non-policymaking. Otherwise, summary judgment is inappropriate.

In *Regan v. Boogertman*, 984 F.2d 577 (2nd Cir. 1993), the trial court granted defendants' motion for summary

judgment. The Second Circuit affirmed, finding as a matter of law, "[s]ince there is no dispute as to any material fact in this litigation," *Id.* at 579, the plaintiff's position was one for which political loyalty was essential. *Id.* at 581. Again, when there is no genuine issue of material fact, a court can rule on a Rule 56(c) motion.

By failing to discuss the procedural posture of any of these Second Circuit cases, Petitioners attempt to convince this Court that the Second Circuit would have decided this case differently. The above analysis clearly demonstrates that, given the facts and procedural posture of this case, the Second Circuit would have made the same decision as the Third Circuit. The Second Circuit like every other one, also recognizes the rather unremarkable proposition that factual disputes cannot be resolved on summary judgment.

C. Petitioners Have Not Cited Any Third Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners claim the caselaw in the Third Circuit is "a morass of contradictory and incomprehensible opinions." (P. 20). If Petitioners took the time to examine these cases, they would see the different outcomes of these cases result from the application of a consistent legal standard to the unique facts of each case.

In *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981), the trial court, finding no factual dispute, granted summary judgment in favor of the defendants. Rather than avoiding the question of whether the *Elrod-Branti* inquiry is for the court or jury, that court clearly stated "it is left to the courts to decide in any particular case whether 'party

affiliation is an appropriate requirement for the effective performance of the public office involved.' " *Id.* at 520. The Third Circuit affirmed, finding as a matter of law that plaintiffs were not entitled to protection under *Elrod-Branti*. The court based its decision on the powers of the plaintiffs' positions as city solicitors as set forth in the York Administrative Code. The plaintiffs argued, based on *Rosenthal v. Rizzo*, 555 F.2d 390 (3d Cir. 1977), that they should have an opportunity to contest the factual issues of what their positions entailed. 660 F.2d at 521. The *Ness* court distinguished *Rosenthal*, noting that in *Rosenthal*, the nature and duties of the plaintiff's position were in dispute, while in *Ness*, the duties of the plaintiffs were set by administrative code and the functions of these duties were undisputed. The *Ness* court explained: "it was improper for the district court to weigh the evidence and rule against Rosenthal on this issue on a Rule 56 motion. . . . This court was criticizing, in particular, the district court's approach of apparently weighing the evidence to make a factual finding in the context of a summary judgment motion." *Id.* at 522 (citations omitted).

Petitioners claim the Third Circuit departed from this precedent in *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986). There, the district court, finding the plaintiff's position was not protected by *Elrod-Branti*, entered judgment in favor of the defendant and dismissed the case. It is unclear what procedural mechanism the district court utilized; neither that court nor the Third Circuit specify. The Third Circuit affirmed the trial court as to the First Amendment claim, finding plaintiff's position was one for which political affiliation was an appropriate requirement based on the undisputed fact that the plaintiff was responsible for writing press releases. *Id.* at 170. Rather

than making any credibility determinations like the trial court did in this case, *Brown* determined as a matter of law that this one undisputed fact was sufficient to demonstrate the plaintiff was not protected by *Elrod-Branti*.

In *Zold v. Township of Mantua*, 935 F.2d 633 (3d Cir. 1991), all of the parties moved for summary judgment in the district court, and the court granted defendants' motion, finding plaintiff held a confidential position. *Id.* at 635. The Third Circuit noted: "[b]oth parties agree that the relevant facts are undisputed. The parties dispute only how the nature of the job should be characterized. Thus, this court is in a position to apply the relevant legal principles to those facts." *Id.* at 636. The court went on to reverse the trial court, finding the defendants failed to meet their burden of proving political affiliation was an appropriate requirement for plaintiff's position. Petitioners are correct: the court did not remand the case for the fact-finder to determine the constitutional issue; it was able to resolve that issue *itself* because there was no factual dispute. Petitioners fail to realize that in the instant case, the Third Circuit did not remand the case for the fact-finder to *determine* the constitutional issue; rather the court remanded the case for the fact-finder to *resolve* the factual dispute.

In *Waskovich v. Morgano*, 3 F.3d 1292 (3d Cir. 1993), the trial judge granted the defendants' motion for summary judgment after holding an evidentiary hearing. The Third Circuit expressed concern about the procedure utilized by the trial court:

> [I]n certain circumstances a district court may hold an evidentiary hearing at which it receives oral testimony, documents, and other evidence relating to a pending summary judgment

> motion, but it may not rely on the material submitted at such a hearing as a means of resolving any genuine issues of material fact. Nor, of course, may it weigh the evidence submitted, judge the credibility of the witnesses who testified, or use the information it receives as a basis for making findings of fact, as all of these activities are incompatible with summary disposition of the case.

Id. at 1296. However, because the trial court held the evidentiary hearing only to determine whether there was a factual dispute and did not weigh the evidence to resolve factual issues, the Third Circuit affirmed.

Petitioners claim the "culmination of confusion created by the Third Circuit" was reached with the decisions in *Wetzel v. Tucker*, 139 F.3d 380 (3d Cir. 1998) and *Boyle v. County of Allegheny, Pennsylvania*, 139 F.3d 386 (3d Cir. 1998).

In *Wetzel*, the trial court granted defendants' motion for summary judgment, finding that the plaintiff's position was not protected by *Elrod-Branti*. 139 F.3d at 383. The Third Circuit affirmed, finding "there is no genuine issue of material fact as to whether political party affiliation is an appropriate criterion for the effective job performance of the Authority's Solicitor. Rather, as a matter of law, political affiliation is an appropriate criterion for the position." *Id.* at 386.

In *Boyle*, the trial court granted the defendants' motion for summary judgment. The Third Circuit reversed, explaining: "had the district court been sitting as the finder of fact, we would have little trouble in

affirming its decision. However, at the summary judgment stage, the district court improperly weighed conflicting evidence in granting the defendants' motion." *Id.* at 392.

The confusion lies not in the Third Circuit's decisions in these two cases, but in Petitioners' inability to comprehend the requirements of Rule 56(c). In *Wetzel*, there was not a genuine issue of material fact; in *Boyle*, there was. In *Boyle* the majority of the hiring authority testified that political affiliation was not an appropriate requirement for the successful performance of the position. In *Wetzel*, only one of the three commissioners so testified. The hiring authority did not concede the issue upon which it shouldered the burden of proof. Therefore, the *Wetzel* court was able to determine the *Elrod-Branti* question on summary judgment, while the *Boyle* court was not. There is nothing confusing about this. Because the Third Circuit in this case found it was in the same posture as *Boyle* rather than that of *Wetzel*, the court reversed the trial court and remanded the case for the fact-finder to resolve the factual dispute before the *Elrod-Branti* question can be answered.

Rather than constituting "a labyrinth of decisions that remain unreconciled," the Third Circuit precedent on the issue at hand is crystal clear: when there is no factual issue, a court can grant summary judgment; when there are facts in dispute, summary judgment is improper. A district court simply cannot resolve factual disputes in the context of a Rule 56(c) motion.

D. Petitioners Have Not Cited Any Fourth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners cite *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990) as evidence the Fourth Circuit would have decided this case differently. (P. 19). The trial court, dealing with a class of more than 100 employees, granted the defendants' summary judgment motions as to 55 class members, but denied summary judgment as to 63, finding that 46 of these were absolutely protected by *Elrod-Branti*. *Id.* at 137. The Fourth Circuit remanded ordering the class be decertified and each individual plaintiff be allowed to proceed with his or her claim individually. *Id.* at 139. The court stated that the *Elrod-Branti* inquiry was a question of law to be decided by the court, *Id.* at 143, but also noted the facts of the case were in dispute. *Id.* at 138. Therefore, the court vacated all of the orders entered by the district court, stating "because of the factual nature of the inquiry necessary for resolution of these individual cases, trial by jury is warranted." *Id.* at 146.

What this Fourth Circuit case demonstrates, and what Petitioners fail to comprehend, is that just because a particular issue is a question of law, that does not mandate that the issue be resolved on summary judgment. The Fourth Circuit in *Stott*, just as the Third Circuit in the instant case, adhered to the requirements of Rule 56(c) and held that summary judgment cannot be granted if there are material facts in dispute. Proceeding to trial and allowing the court to decide the *Elrod-Branti* question are not mutually exclusive propositions.

E. Petitioners Have Not Cited Any Fifth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners point to *Stegmaier v. Trammel*, 597 F.2d 1027 (5th Cir. 1979), claiming the Fifth Circuit ignores *Elrod's* holding that whether a position is protected involves a question of constitutional interpretation for the court. (P. 16-17, 27). In *Stegmaier*, the district court, based on the complaint, answer, and the defendant's affidavit in support of his motion for summary judgment, decided the Plaintiff's position was a policymaking position, and thus the dismissal did not violate the Constitution. 597 F.2d at 1031. The Fifth Circuit affirmed the trial court's decision, finding the plaintiff was a confidential employee. *Id.* at 1040. The court decided the issue as a matter of law because the duties of the plaintiff's position were clearly defined by statute; the duties and responsibilities of the position were not in dispute.

Petitioners' citation of *Stegmaier* for the proposition that the Fifth Circuit believes the *Elrod-Branti* decision is for the jury rather than the court is simply baffling: That case never went to a jury. It was decided by the court as a matter of law.

F. Petitioners Have Not Cited Any Sixth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

In *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997), the trial court dismissed the plaintiff's claim as moot. As an alternative ground for affirming this decision, the Sixth Circuit found, based on the inherent duties of a

Domestic Relations Court Referee as found in the Ohio Rules of Civil Procedure, that position was not protected by *Elrod-Branti*. The duties were not in dispute.

In *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999), on reviewing the trial court's various rulings on several summary judgment motions, the Sixth Circuit stated, "[a]lthough the parties give a different spin on the evidence, the underlying facts – what the duties of the jobs are as seen by the plaintiffs and by Sizemore – are not disputed." *Id.* at 212. As such, the court was able to rule on the legal issue of whether the plaintiffs' positions were protected by the First Amendment.

In *Sowards v. Loudon County, Tennessee*, 203 F.3d 426 (6th Cir. 2000), the district court granted the defendants' motion for summary judgment, finding there was not a genuine issue of material fact to show the plaintiff's protected activity substantially motivated her termination. *Id.* at 429-30. On appeal, the Sixth Circuit stated, "Whether political affiliation is an appropriate consideration for a government position is a question of law. The 'issue on summary judgment is whether defendants have established that no genuine factual issue over whether political affiliation may appropriately be considered with respect to the position in question.' " *Id.* at 435 (citations omitted). As the plaintiff's duties were set by statute, there was no factual dispute regarding the powers of her position. Therefore, the court was able to determine as a matter of law that the plaintiff's position was protected by the First Amendment. *Id.* at 438.

Thus the Sixth Circuit, like all of the others, holds that an *Elrod-Branti* case can be disposed of on summary

judgment if the duties and powers of the plaintiff's position are not in dispute. If there is a genuine issue of material fact, summary judgment is inappropriate.

G. Petitioners Have Not Cited Any Seventh Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

In *Kline v. Hughes*, 131 F.3d 708 (7th Cir. 1997), both the plaintiff and defendant filed motions for summary judgment in the district court, each alleging there was no dispute of material fact and thus each was entitled to judgment as a matter of law. *Id.* at 709. The district court granted the defendant's motion. The Seventh Circuit affirmed, finding the powers of the plaintiff's position, which were set by statute and not in dispute, allowed the plaintiff meaningful input into governmental decision-making, thus the position was unprotected by *Elrod-Branti*. *Id.* at 710. Presented with a Rule 56(c) motion and no factual dispute, the court ruled as a matter of law. There was no reason for the court to distinguish "a question of law" from "judgment as a matter of law;" the court decided the issue before it.

In discussing *Kline*, petitioners complain "[w]hile the application of *Elrod-Branti* was decided by the court, the decision was based upon the summary judgment standard." (P. 27). What else is a court supposed to do when deciding a Rule 56(c) motion? When a court is ruling on a summary judgment motion, the court must apply the summary judgment standard.

H. Petitioners Have Not Cited Any Eighth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners correctly note the Eighth Circuit maintains the *Elrod-Branti* inquiry is a question of law for the court. (P. 19). However, the Eighth Circuit does not suggest the court may decide the issue on summary judgment if there are material facts in dispute.

In both *Gibbons v. Bond*, 668 F.2d 967 (8th Cir. 1982), and *Barnes v. Bosley*, 745 F.2d 501 (8th Cir. 1984), the district courts, after a bench trial, weighed the evidence and determined as a matter of law whether the plaintiffs' positions were protected by the First Amendment. In neither case did the court weigh evidence to decide a summary judgment motion.

In *Horton v. Taylor*, 767 F.2d 471 (8th Cir. 1985), after a bench trial, the trial court entered judgment in favor of the defendant, finding the plaintiffs were not protected by *Elrod-Branti*. *Id.* at 473. The Eighth Circuit reversed the trial court, there was "insufficient evidence to raise an issue for the trier of fact," *Id.* at 478, and determined as a matter of law that the plaintiffs were protected by the First Amendment. *Id.* The issue was decided by both courts after all of the evidence was presented at trial; neither court resolved factual issues on summary judgment.

In *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986), the trial court sent the *Elrod-Branti* question to the jury. The Eighth Circuit held the trial court erred in doing so, and itself decided the issue as a matter of law based on the complete record of evidence submitted at trial. The court

was not deciding a summary judgment motion, but was reviewing the trial court's order, entered upon the jury verdict, that the plaintiff's Constitutional rights had been violated.

None of the Eighth Circuit cases cited by Petitioners even involve a motion for summary judgment. Rather, in all of these cases, the Eighth Circuit held it was proper for the court to decide the *Elrod-Branti* question as a matter of law after all of the evidence had been produced at trial. This position in no way contradicts the Third Circuit's holding in this case, for the Third Circuit merely found there are issues of fact to be resolved by the fact-finder before the *Elrod-Branti* question can be answered. The Third Circuit did not hold the jury must decide the *Elrod-Branti* question; it only held the question cannot be answered at this juncture.

I. Petitioners Have Not Cited Any Ninth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

Petitioners claim the Ninth Circuit "sits on the fence" between the view that the *Elrod-Branti* question is a question of law and the view that it is a question of fact. (P. 28). In *DiRuzza v. County of Tehama*, 206 F.3d 1304 (9th Cir. 2000), petitioners correctly note that the Ninth Circuit reversed the trial court's grant of summary judgment in favor of the defendants, finding a genuine issue of material fact existed regarding the duties the plaintiff actually performed. *Id.* at 1311. The Ninth Circuit therefore remanded the case for the trial court to determine whether the plaintiff was a policymaker. *Id.* at 1313.

Petitioners are correct that the Ninth Circuit did not remand the case and instruct that the jury should decide the *Elrod-Branti* question. Nor did the Third Circuit in this case. What both courts held, as did every other court that addressed the issue, is that the *Elrod-Branti* question cannot be answered as a matter of law pursuant to a summary judgment motion when there are material facts in dispute. The Ninth Circuit does not sit on a fence between any opposing views. The Ninth Circuit, like all of the other circuits, follows the requirements of Rule 56(c).

J. Petitioners Have Not Cited Any Tenth Circuit Cases In Which The Court Resolved Factual Issues On A Rule 56(c) Motion.

In *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988), the trial court granted the defendants' motion for summary judgment, finding the defendants had the authority to make new appointments to the plaintiffs' positions. The Tenth Circuit reversed, holding, based on the clear and undisputed duties of the plaintiffs' positions, that the positions were protected by *Elrod-Branti* as a matter of law. *Id.* at 1444. The Tenth Circuit remanded to the fact-finder to determine whether the plaintiffs' political association motivated their discharges. *Id.* at 1445. Again, no factual dispute existed and the court ruled on the *Elrod-Branti* issue as a matter of law.

Similarly, in *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), the Tenth Circuit affirmed grant of summary judgment in favor of defendants, agreeing there

was no genuine issue of material fact and the defendants were entitled to judgment as a matter of law. *Id.* at 1138.

Petitioners show nothing more than that the Tenth Circuit does what every other circuit does when the facts are not disputed and the moving party is entitled to judgment as a matter of law.

CONCLUSION

Even if petitioners had not waived the question they present by failing to raise it before the district court or the Court of Appeals panel, the issue is not ripe for adjudication because it would not properly have been before the Court of Appeals on review of a summary judgment record. For any and all reasons set forth above, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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No. 01-1403

In the Supreme Court of the United States

THE COUNTY OF BEAVER, PENNSYLVANIA AND BEA SCHULTE, COMMISSIONER, IN HER INDIVIDUAL CAPACITY,

Petitioners,

v.

DELORES ARMOUR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Question Presented for Review by Petitioners Was Pressed or Passed upon in the Lower Courts.

Petitioners reply to the first issue raised by the Respondent, stated as: "Petitioners' failed to raise the issue with the district court or the court of appeals panel." The issue presented by Respondent is a misstatement of the standard for review applicable to this Honorable Court.

The traditional rule followed by this Honorable Court precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). Respondent sets forth a string citation of cases in support of her theory that this Court should not consider an issue "not raised in the lower courts." Respondent's Brief p. 6-7. The majority of these cases are cited for the boilerplate proposition espoused by Respondent and are simply inapplicable to the issue presented to this Court. The cases involve new arguments raised by respondents, issues not raised in the petition for certiorari and claims not raised or addressed by the lower courts at any point in the litigation. This is not the situation in the case at bar and this Court need look no further than its decision in *Williams* to reject the argument raised by Respondent as a red herring.

Respondent asks this Court to ignore one half of the standard to be applied in granting certiorari and in the process ignore the precise holding of the Court of Appeals. As noted in *Williams*, the inquiry into whether a question has been pressed or passed upon "operates (as it is phrased) in the disjunctive...." *Id.* The grant of certiorari is permitted where the court of appeals has passed upon the question in issue, whether or not the issue was pressed in the precise manner

posed upon petition for certiorari. Time and again, this Court has granted certiorari in circumstances similar to that presented in the case at bar and there exists no rationale for deviating from this traditional rule at this juncture. See *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n. 8 (1991); *City of Springfield v. Kibbe*, 480 U.S. 257, 266 (1987).

In the case *sub judice*, the issue presented for review is the precise issue addressed by the Court of Appeals below. The question presented is whether the *Elrod/Branti* inquiry into whether a governmental position is entitled to First Amendment protection against patronage dismissals is a question of law for the court or a question of fact for the jury. It is difficult to comprehend how a rational argument can be made that this issue was not understood and passed upon by the Third Circuit, when the opinion of the Court specifically decides the issue. The Court of Appeals fashioned the question as "..whether being the personal secretary to a county commissioner is, without more, sufficient evidence to establish as a matter of law that political affiliation is an appropriate job requirement." App. C at 38a. The Court goes on to hold that "... determining whether the defendants, on whom the burden rests, have been able to establish that Armour's job falls outside the protections of *Elrod* and *Branti* is a mater for the factfinder, not for the District Court on summary judgment." App. C at 40a, n. 6. The Court of Appeals directly decided that the ultimate determination as to whether political affiliation was an appropriate requirement for the Respondent's job fell to the jury, rather than the court. Similar to the situation in *Williams* and the cases cited therein, the issue before this Honorable Court was pressed and passed upon in the courts below and has been sufficiently preserved to allow the grant of certiorari.

Respondent points to the procedural history of this case in support of her argument against granting certiorari. The procedural history is important, but not in the way propounded by Respondent. Respondent notes that Petitioners moved for summary judgment pursuant to Rule 56(c) claiming no material disputes of fact existed and entitlement to judgment as a matter of law. This is absolutely accurate, but not supportive of Respondent's position at all. Rule 56(c) specifically sets forth that standard for summary judgment. Petitioners could hardly have submitted a motion for summary judgment and ignored the standard imposed by the Federal Rule of Civil Procedure. Once again, Respondent confuses a fact-intensive inquiry, which the *Elrod/Branti* issue admittedly is, and a question of fact. The District Court identified the undisputed facts and applied the *Elrod/Branti* analysis to those facts to arrive at the legal conclusion that the position in question was not protected by the First Amendment.

The Respondent appealed from this decision. The respondent framed the question on appeal and consistently argued to the Third Circuit that the sum total of the evidence revealed a clerical position for which political affiliation was not an appropriate requirement, moving the Circuit Court to reverse the district court's decision to the contrary. The Third Circuit agreed with Armour's position ultimately deciding, not that the record was unclear or that there were disputes over the job duties, but rather that the evidence presented could be interpreted in different ways as to whether the position was protected under the First Amendment, and that the opportunity for differing interpretations raised an issue for the jury. The issue argued by appellant, responded to by appellee, and addressed by the Circuit Court was whether the position of commissioner's secretary was one for which political affiliation was an appropriate job requirement.

The Circuit Court did not determine that material issues of fact precluded summary judgment, but that the application of facts to the ultimate constitutional question was for the jury.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2, quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). *Harris* was an ERISA case wherein respondent argued, in part, that petitioner had waived a theory under ERISA for failing to raise the issue below. The Court held "[e]ven assuming that petitioners did not pellucidly articulate this theory before the Seventh Circuit, it appears that the Seventh Circuit understood the tenor of the argument . . ." Id. In this case, the fact/law dichotomy is an argument subsumed within the overall issue presented to the Court of Appeals and clearly an issue not lost upon the Court, as its opinion squarely addresses the question. The issue presented for review had been raised and passed upon before the lower courts and it is now ripe for consideration by this Honorable Court.

CONCLUSION

For the foregoing reasons and the reasons contained in the petition for writ of certiorari, the petition should be granted.

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